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THE NEXT STEP IN DIVERSITY: EXTENDING THE LOGIC OF *GRUTTER V. BOLLINGER* TO FACULTY TENURE

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I. INTRODUCTION

Prior to 2003, the United States Supreme Court had decided only one case involving affirmative action policies in higher education. In *Regents of University of California v. Bakke*,[1] the Court overturned a medical school's racial set-aside program that reserved 16 out of 100 admission slots for members of certain minority groups.[2] Twenty-five years later, the Court in *Grutter v. Bollinger*[3] upheld the University of Michigan Law School's race-conscious admissions policy.[4] This decision hinged on the issue of whether diversity constitutes a compelling interest that can justify the "use of race in selecting applicants for admission to public universities."[5] Never before had the Court recognized diversity as a compelling interest that could sustain a challenge brought under the Fourteenth Amendment's Equal Protection Clause.[6] In making that recognition, the Court relied heavily on the arguments of law school faculty and administrators regarding the vital educational benefits derived from classroom diversity.[7] Such diversity, the argument maintained, was essential for the development and training of society's future leaders.[8]

The *Grutter* Court accepted without question the arguments pressing for student-body diversity to be ruled a compelling interest.[9] However, if a racially diverse student body leads to a "livelier, more spirited" classroom discussion and a "better understanding" of different races,[10] logic dictates that a truly diverse faculty would more directly and immediately lead to such an outcome. If an institution of higher education has a compelling interest in racially diversifying its students, it has an even

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1. 438 U.S. 265 (1978).
2. *Bakke*, 438 U.S. at 271.
3. 539 U.S. 306 (2003). The companion case to *Grutter*, decided at the same time and involving the admissions policies to the University of Michigan undergraduate program, was *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).
4. *Grutter*, 539 U.S. at 307-10.
5. *Id.* at 322.
6. *Id.* at 341.
7. *Id.* at 308.
8. Not only did minority students have to be admitted so as to create this diversity, but a "critical mass of underrepresented minority students" was needed. *Id.* at 319.
9. *Id.* at 307-08.
10. *Id.* at 330.

greater interest in racially diversifying its faculty. The problem, though, is tenure. A law school's student body turns over every three years; and every fall an entirely new class of students is admitted. Consequently, student diversity can be achieved somewhat quickly. But faculty diversity is another matter. Because of tenure, very few openings occur each year. While new hires may be subjected to affirmative action guidelines, true diversity will come very slowly, especially if none of the tenured professors resign or retire.

There is no group in society more committed to affirmative action and racial diversity than the nation's higher education faculty.[11] At the same time, under the logic of *Grutter*, there is no group in society more vital to the training and education of America's diverse population. Given this urgent and vital need for diversity, this article asserts that the arguments made in *Grutter* for a race-based student admissions policy extend logically to a university's dismantling of its tenure system so as to achieve a faculty as equally diverse as its students.

II. THE SUPREME COURT'S DECISION IN *GRUTTER*

At issue in *Grutter* was the University of Michigan Law School's (Law School) race-conscious admissions policy.[12] Petitioner Grutter, a white applicant to the Law School who had qualifying test scores and grade point average, filed suit after she was denied admission, claiming that the Law School had discriminated against her on the basis of race in violation of the Fourteenth Amendment's Equal Protection Clause.[13] The Law School admitted that it used a race-conscious admissions policy to enroll a critical mass of certain minorities, and that this critical mass was "a number that encourages under represented minority students to participate in the classroom and not feel isolated."[14] According to the Law School, only a critical mass could achieve the "educational benefits

11. *See infra* notes 34 and 36.

12. *Grutter*, 539 U.S. at 306. This policy, implemented as a means of achieving student diversity, "[affirmed] the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers." *Id.* The policy "requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives." *Id.* at 315. The policy "seeks to guide admissions officers in producing classes both diverse and academically outstanding." *Id.* at 316. What the race-conscious policy attempted to do was to enroll a "critical mass" of certain minority students. *Id.*

13. *Id.* at 316-317. The president of the University of Michigan at the time of the lawsuit's filing was Lee Bollinger. *Id.* at 316.

14. *Id.* at 318. At trial, the Director of Admissions for the law school testified that the race of applicants must be considered "because a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores." *Id.* The faculty member who chaired the committee that drafted the race-conscious admissions policy testified that the policy aimed at including "students who may bring to the Law School a perspective different from that of members of groups which have not been the victims of such discrimination." *Id.* at 319.

of diversity."[15] As Justice O'Connor stated in her opinion for the Court, *Grutter* presented an issue of national importance—"[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[16]

In her opinion, Justice O'Connor recognized that the Law School's admissions policy "must be analyzed by a reviewing court under strict scrutiny."[17] When strict scrutiny is employed, a race-based action can survive only if it is narrowly tailored to serve a compelling government interest.[18] Relying upon Justice Powell's opinion in *Bakke*, Justice O'Connor ruled that "the attainment of a diverse student body" did indeed constitute a compelling state interest that justified the use of race in admissions decisions.[19] However, Justice O'Connor limited that ruling to the area of higher education, stating that universities occupy "a special niche in our constitutional system."[20] When reviewing race-based governmental action, even under a strict scrutiny analysis, courts must consider the "context" and all "relevant differences," Justice O'Connor

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15. *Id.* at 319. When such a critical mass is present, "racial stereotypes lose their force because nonminority students learn there is no 'minority viewpoint' but rather a variety of viewpoints among minority students." *Id.* at 320.

16. *Id.* at 322. This issue had been previously addressed by the Fifth Circuit in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest) and by the Ninth Circuit in *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) (ruling that diversity is a compelling state interest).

17. *Id.* at 331. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.* at 326 (quoting U.S. CONST. amend. XIV). Therefore, any governmental action based on race classifications must be subject to "detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Id.* at 326 (quoting Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that "government may treat people differently because of their race only for the most compelling reasons")).

18. *Id.* at 327. While much of the Court's opinion, as well as the dissenting opinions, addressed the 'narrowly-tailored' requirement, this article will focus on the 'compelling government interest' requirement of strict scrutiny review.

19. *Id.* (stating that "today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions"). According to Justice O'Connor's rendition of his opinion, Justice Powell had been careful to state that race was only one factor among many that a university may properly consider when compiling a diverse student body. *Id.* As Justice Powell wrote, the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

The *Bakke* decision produced six separate opinions, none of which produced a majority of the Court. *Id.* Justice Powell provided the fifth vote which broke the logjam between the four Justices who would have upheld the racial set-aside program on the ground that race could be used to remedy the injuries caused by past racial prejudice. *Id.* at 325 (joint opinion of Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). Four other Justices never even reached the constitutional question, but struck down the program for statutory reasons. *Id.* at 408 (opinion of Stevens, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., concurring in judgment in part and dissenting in part). Justice Powell's opinion announcing the judgment of the Court invalidated the set-aside program, yet reversed the state court's injunction against any use of race whatsoever. Thus, according to O'Connor's opinion in *Grutter*, the only holding in *Bakke* was that a state "has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Grutter*, 539 U.S. at 322-23, quoting *Bakke*, 438 U.S. at 320.

20. *Grutter*, 539 U.S. at 329.

wrote.[21] Upon such consideration, diversity in the realm of higher education becomes a compelling government interest because of the unique and vital "educational benefits" it provides.[22]

According to Justice O'Connor's opinion, diversity promotes "cross-racial understanding," helps students to "better understand persons of different races," and leads to a "more enlightening and interesting" classroom discussion.[23] Diversity not only prepares students to be good citizens, but helps train them to be society's future leaders.[24] Furthermore, since education "is the very foundation of good citizenship," diversity in our colleges and universities demonstrates that "public institutions are open and available to all segments of American society, including people of all races and ethnicities."[25] Thus, higher education, and particularly the nation's law schools, plays an indispensable role in conveying "generic lessons in socialization and good citizenship."[26] This is a role that sets higher education apart, in terms of affirmative action policies, from other social or economic institutions or organizations.

The Court applied the strict scrutiny test the way it did because of the special nature of higher education. Normally, the use of strict scrutiny spells the demise of whatever government action is being challenged.[27] Rarely does the Court apply strict scrutiny, as it did to the Law

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21. *Id.* at 327. According to Justice O'Connor, "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." *Id.* "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context." *Id.* at 328.

22. *Id.* For this reason, it is doubtful that *Grutter* applies to affirmative action programs outside of the educational area.

23. *Id.* at 330. According to the Court, the educational benefits of diversity are "important and laudable." *Id.* The Court also cited studies which show that student diversity "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.*

24. *Id.* at 332. Institutions of higher education, and particularly law schools, "represent the training ground for a large number of our Nation's leaders." *Id.* (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950) (describing law school as a "proving ground for legal learning and practice")). As the Court recognized, persons with law degrees occupy more than half of the seats in the U.S. Senate. *Id.* The Court also cited Justice Powell's opinion in *Bakke*, which stated that the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 324, quoting *Bakke*, 438 U.S. at 313. According to Justice O'Connor, "law schools cannot be effective in isolation from the individuals and institutions with which the law interacts." *Id.* at 332.

25. *Id.* at 331-32. "And nowhere is the importance of such openness more acute than in the context of higher education." *Id.* at 332. This openness is vital for instilling the confidence of a heterogeneous society in the integrity of its educational institutions. *Id.* The Court likened higher education to the military, in the sense that America's "most selective institutions must remain both diverse and selective." *Id.* at 331.

26. *Id.* at 348 (Scalia, J., concurring in part, dissenting in part).

27. The Court has previously held that racial classifications are "presumptively invalid and can be upheld only upon an extraordinary justification." Shaw v. Reno, 509 U.S. 630, 643-44 (1993). Almost never do government actions survive strict scrutiny. In fact, "when the Court has applied strict scrutiny to a race-conscious measure designed to assist minorities, it has never upheld the measure." Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J., 427, 433 (1997). *See generally* City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) (applying strict scrutiny to overturn race prefer-

School's admissions policy, and still uphold the policy or program at issue.[28] Thus, the only explanation for the *Grutter* outcome is that in the field of higher education, diversity provides an extra-compelling governmental interest.[29] If this is the case, then diversity should also justify

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ences in government contracting). Lower courts have previously used strict scrutiny to invalidate race-conscious policies in public university admissions. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). *See also* Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996) (invalidating race preferences in employee layoff policies). Strict scrutiny, as the highest standard of constitutional review, has been famously termed by Gerald Gunther as "strict in theory and fatal in fact." Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

Before 1995, affirmative action programs implemented by the federal government only needed to pass the intermediate scrutiny test. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564-65 (1990). But in *Adarand Constructors, Inc. v. Peña*, the Court shifted its stance and held that strict scrutiny applies to all government affirmative action programs. 515 U.S. 200, 235 (1995) (holding that "federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest").

28. According to the dissent, the Court made no serious effort to scrutinize the Law School's claim that it "has a compelling interest in securing the educational benefits of a diverse student body." *Grutter*, 539 U.S. at 356 (Thomas, J., concurring in part and dissenting in part). The dissent described the Court's approach as "unprecedented deference to the Law School—a deference antithetical to strict scrutiny." *Id.* at 362. In his dissent, Chief Justice Rehnquist argued that "[a]lthough the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference." *Id.* at 380 (Rehnquist, C.J., dissenting). Justice Kennedy stated that the Court, "in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements." *Id.* at 389 (Kennedy, J., dissenting).

29. Justice O'Connor suggested that the reason for the unusual deference toward a racial discriminatory policy lay in the First Amendment's protection of academic freedom and educational autonomy. *Id.* at 329 (citing *Bakke*, 438 U.S. at 312) (stating that the "freedom of a university to make its own judgments as to education includes the selection of its student body"). However, educational autonomy is a highly suspect basis for judicial deference on something as important as racial discrimination. Even with the First Amendment and freedom of speech, the Court has not given deference to educational institutions. In *Tinker v. Des Moines Sch. Dist.*, the Court refused to let a school censor an anti-war symbol worn by students throughout the school day. 393 U.S. 503, 514 (1969). The school argued that, during the height of the Vietnam War, such symbols would cause disruption within the school. *Id.* at 510. But even though this was an issue that touched upon the educational and learning environment of the school, the Court refused to defer. *Id.* at 514.

Likewise, in *Bd. of Educ. v. Pico*, the Court declined to defer to a school's decision to remove some "just plain filthy" books from the school library. 457 U.S. 853, 857 (1982). But this issue again went to the very heart of the school's educational mission—e.g., the kind of books and materials to which it was exposing its students. *Grutter*, on the other hand, involves an issue less central to the educational function of the school. It does not involve the behavior of students who are already in a classroom, nor does it involve the kind of books that are filling library bookshelves and being read by students. Instead, *Grutter* involves a kind of pre-education decision—e.g., whom to admit as students. In a sense then, *Grutter* involves a gate-keeping function, performed prior to any educational function. Thus, there is less of a need to respect the educational autonomy of the Law School in this regard. Moreover, the notion of academic freedom and educational autonomy are justified in part by the courts' acknowledgment that they are not the best judges of such matters. *See generally* Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

The courts, with regard to education, have traditionally taken a hands-off approach and left educational matters to the educators. For instance, in a situation like *Tinker*, where possible disruption of the actual school environment is concerned, courts defer and recognize that educators are in the best position to judge. Similarly, in cases like *Pico*, where the choice of learning and textual materials is concerned, the courts consider that educators are in a better position to judge. But in *Grutter*, which entails a race-based admissions policy, the courts are actually in a better position to judge, and hence should be less likely to defer. Perhaps the courts cannot adequately determine the effect of sexual innuendo on children (as in *Bethel*) or the role and standards of a

other governmental actions that would not otherwise be permissible in any other area.

The fact that the Law School's admissions policy survived strict scrutiny—a feat that almost no other state interest ever accomplishes—means that diversity in the educational arena is an interest that surpasses all other government interests. Furthermore, it means that racial diversity constitutes a subject matter that the courts will treat differently than any other area of constitutional protection. For instance, a program that restricts the speech rights of a particular group of people will almost automatically be struck down, but a program that infringes on the equal protection rights of a particular racial group may survive if the purpose is to create racial diversity. Because of this apparently unique mixture of diversity, education and race, it is asserted below that the same arguments presented in *Grutter* can also justify governmental encroachment on the property rights of tenured faculty.

III. THE EXTENSION OF *GRUTTER* TO FACULTY DIVERSITY

The argument used by the University of Michigan for the achievement of a critical mass of underrepresented minorities was that without such numbers, minority students would feel isolated and pressured to act like spokespersons for their race.[30] According to the Law School, only a critical mass of minority students would provide a meaningful opportunity for all students to reexamine racial stereotypes and produce the educational benefits that diversity has to offer.[31] However, as the dissent pointed out, it is the educational benefits that are the real goal or compelling interest behind the Law School's race-based admissions policy.[32]

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school newspaper (as in *Hazelwood*), but courts are definitely in a position to adequately judge the constitutionality of race-based actions.

The Court's decision in *United States v. Virginia* also indicates that *Grutter* cannot be explained on the basis of educational autonomy or academic freedom. 518 U.S. 515 (1996). In *Virginia*, the Court found an equal protection violation in a state military college's exclusion of women. *Virginia*, 518 U.S. at 545-46. This finding occurred even though the college argued that "single-sex education provides important educational benefits," as well as "character development and leadership training." *Id.* at 535. Furthermore, the Court acknowledged that several amici urged that "single-sex schools can contribute importantly to [educational] diversity." *Id.* at 534 n.7. Yet despite these educational-benefits arguments, and despite the fact that the Court evaluated the case under a lower level of scrutiny than that used in *Grutter*, the Court did not recognize educational autonomy and defer to the judgment of the school. *Id.* at 533, 555 (stating that the test used for evaluating gender-based classifications is "whether the proffered justification is exceedingly persuasive," and that such classifications warrant "heightened scrutiny"). *See also* Jeffrey A. Barnes, *The Supreme Court's "Exceedingly [Un]persuasive" Application of Intermediate Scrutiny in* United States v. Virginia, 31 U. RICH. L. REV. 523, 523 (1997) (noting that the Court in *Virginia* applied a "form of intermediate scrutiny").

30. *See* Respondent's Brief at 26, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

31. As the Court's opinion stated, "diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students." *Grutter*, 539 U.S. at 333. The Court accepted without question the Law School's conclusion, based on its experience, "that a critical mass of under represented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." *Id.*

32. *Id.* at 355 (Thomas, J., concurring in part and dissenting in part).

Diversity, in effect, is only the means to the end.[33] If diversity produced no educational benefits, then diversity would not be a compelling interest of an institution of higher education. But when educational benefits are recognized as the real goal, then student diversity must be recognized as the second-best way of reaching that goal. Since faculty are the leaders of the educational environment in universities and law schools and, hence, are in the best position to produce educational benefits, then it stands to reason that faculty diversity is more urgent and vital than student diversity.

As a group in general, university faculty have been strongly supportive of affirmative action.[34] Law schools in particular have put immense pressure on themselves to diversify. Schools that fail to make progress in diversifying their student bodies risk loss of accreditation from the American Bar Association and the American Association of Law Schools.[35] In *Grutter*, ninety-one colleges and universities filed briefs in support of the University of Michigan; not one college or university filed a brief opposing affirmative action.[36] A recent survey of 500 law school faculty members found that an overwhelming majority supported efforts to achieve diversity in the classroom.[37] Not only have law school faculty been outspoken advocates for affirmative action in academia, but they have argued for its implementation elsewhere.[38]

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33. "And, for law schools especially, racial and cultural diversity is crucial in order to prepare students to be effective and responsible lawyers, academics and judges in an increasingly multi-racial, multi-ethnic and multi-cultural world." Brief of Amici Curiae Judith Areen et al. at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241).

34. Robert Atwell, president of the American Council on Education, has characterized the legal arguments against racial preferences as "bogus." Elizabeth Shogren, *In U.S. Reversal, Minority-Based Scholarships OK*, L.A. TIMES, Feb. 18, 1994, at A1. In general, "there is an abundance of commentary by educators on the pedagogical value of attaining a racially diverse student body." Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 393, 411 (1998). *See also* Richard A. White, *Law School Faculty Views on Diversity In the Classroom and the Law School Community*, (May, 2000), at http://www.aals.org/statistics/diverse3.pdf (discussing widespread law faculty support for diversity in the classroom).

35. Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 795 (1995).

36. Neal Devins, *Explaining* Grutter v. Bollinger, 152 U. PA. L. REV. 347, 368 (2003) (explaining that the briefs argued that "pluralistic, widely representative colleges provide a more enriching learning environment and better preparation for life in a multicultural world"). *See also* Suzanne E. Eckes, *Race-Conscious Admissions Programs: Where Do Universities Go From* Gratz *and* Grutter*?*, 33 J.L. & EDUC. 21, 48 (2004) (describing the amici briefs filed by universities in support of the University of Michigan's race-based admissions policy as arguing that "diversity is essential for the interplay of ideas in a nation that is becoming increasingly diverse").

37. *See* Eckes, *supra* note 36, at 49. Prominent law faculty members have argued that students benefit in an ethnically diverse classroom. *See* Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1159-60 (1996). Psychology professors have also argued that students learn better in a diverse educational environment. *See* Eckes, *supra* note 36, at 50. The presidents of sixty-two major research universities have publicly defended the use of race in admissions decisions. *See* Association of American Universities, *On the Importance of Diversity in University Admissions*, N.Y. TIMES, Apr. 24, 1997, at A27.

38. *See* Frances Lee Ansley, *Stirring the Ashes: Race, Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1071 (1989) (arguing that legal scholars "must continue to

In espousing the value of diversity in higher education,[39] legal scholars have argued that any hope in making racial progress lies "in the unique ability of colleges and universities to bring together persons of all racial backgrounds to achieve the educational benefits of diversity and, ultimately, to create a more just, racially integrated society."[40] This call for diversity in higher education includes and recognizes the need for faculty diversity.[41] Indeed, a diverse faculty is even more important than a diverse student body, in terms of producing enlightening classroom experiences.[42] As one minority law student reports, "women and minorities can feel silenced" by white male professors.[43]

Faculty diversity appears to be a necessary condition to student diversity. Minority students may not enroll at an institution that does not have sufficient minority faculty; and even if they do enroll, they may find themselves alienated and eventually drop out or transfer.[44] More-

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work for greater diversity at home on university faculties" and to "defend affirmative action from attack in other institutions as well").

39. *See* Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1615-16 (2003). *See also* Robert A. Sedler, *Affirmative Action, Race, and the Constitution: From* Bakke *to* Grutter, 92 KY. L.J. 219, 235 (2003-2004) (arguing that if "racial minorities are truly to be full and equal participants in all important areas of American life, this should include minority representation in substantial numbers at the elite universities and at their law schools and medical schools as well"). Law faculty also report that students value and welcome diversity. In one survey, nearly fifty percent of the law students said that diverse classes offer "more serious discussions of alternative perspectives than homogeneous classes." Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2266 (2000). Numerous published studies argue that diversity serves the educational mission of the nation's law schools. *See, e.g.*, GARY ORFIELD & DEAN WHITLA, DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES IN LEADING LAW SCHOOLS 4-6, 15 (1999); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 865 (2000).

40. Brief of Amici Curiae NAACP Legal Defense Fund and the ACLU at 2, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

41. Diversity, in this sense, means racial diversity. *See* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1882 (1996) (stating that because "a professor's experiences, outlooks, and ideas do correlate in some measure with his or her race, an unbiased decisionmaker could conclude that race can sometimes be a reasonable proxy for intellectual diversity").

42. *See* Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 864 (1995) ("It is largely the faculty who set an institution's tone and agenda").

43. Moran, *supra* note 39, at 2282 (reporting that opinions expressed in a student survey included one student's statement that "most professors are White males, so White males feel more comfortable participating" in the classroom). In general, students say that "the professor play[s] a significant role in setting the tone for discussion" in the classroom. *Id.* at 2287.

44. *See* Abigail Thernstrom, *Voting Rights: Another Affirmative Action Mess*, 43 UCLA L. REV. 2031, 2048 (1996) (citing the argument for the need of minority faculty to connect with and serve as a positive influence to minority students). *See also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1080 (1991) (arguing that white teachers, unaware of race and cultural differences, can unwittingly disadvantage black students by asking questions in ways that conform to white middle-class customs). According to supporters, affirmative action is needed not only to give students authority figures with whom they can connect, but also to eliminate "black invisibility" by demanding that whites see "blacks in positions of power, authority, and responsibility—as teachers . . . ." *Id.* at 1109. Various surveys have concluded that minority students can feel discrimination from and have very little interaction with white faculty. *See, e.g.*, Sylvia Hurtado, *Graduate School Racial Climates and Academic Self-Concept Among Minority Graduate Students in the 1970's*, 102 AM. J. EDUC. 330 (1994); Sylvia Hurtado & Deborah Faye Carter, *Effects of College Transition and Perceptions of the Campus Racial Climate on Latino College Students' Sense of Belonging*, 70 SOCIOLOGY OF EDUC. 324, 325-38 (1997).

over, there is an argument that the absence of minority faculty "lessens the probability that minority students will complete graduate and professional programs at the same rate as white students."[45] A research study asserts that the best predictor of graduation rates of African-American graduate and professional students is the presence of minority faculty members.[46] Schools that had African-American faculty members were found to have graduated more African-American students.[47] Therefore, by implication, if an institution does not have a critical mass of minority faculty, it may not be able to attract and keep a critical mass of minority students.[48]

The chain of argument goes as follows: to achieve student diversity, a diverse faculty must be present; and to achieve a diverse faculty, affirmative action programs must be implemented. Without such programs, minority faculty members and candidates face unfair and prejudicial barriers; and if they have not graduated from prestigious schools, minority candidates may not be able to compete with those candidates who have.[49] According to academic supporters of affirmative action, minority scholars often face discrimination regarding their fields of research.[50] Furthermore, because they are less likely than their white col-

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45. Edgar G. Epps, *Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO ST. L.J., 755, 759 (1998).

46. *See* JAMES E. BLACKWELL, MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS 64 (Philip Eisen ed., General Hall, Inc.1981).

47. *See id.* at 70.

48. *See* Epps, *supra* note 45, at 759-60. Furthermore, the "research suggests that the presence or absence of minority faculty members in graduate and professional schools is a relatively good informal indicator of an institution's commitment to the goal of equal opportunity for minorities in higher education." *Id.* at 759. Professors Brest and Oshige argue that minority faculty "tends to make minority students feel that they are welcomed at the institution." Brest & Oshige, *supra* note 42 at 865. Minority faculty often provide "counsel, support, and comfort for minority students." *Id.* "[T]he presence of minority faculty lends reality to the possibility of academic careers for minority students." *Id.* Moreover, minority faculty have a beneficial effect on white students who may never before have "encountered members of minority groups in positions of authority." *Id.*

49. *See* Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 361-362 (1989).

50. *See* Aleinikoff, *supra* note 44 at 1085 (arguing that "scholarship done by minority scholars on minority issues is frequently greeted with skepticism from majority members of the academy."). According to Professor Aleinikoff, race-consciousness is "an entrenched structure of thought," even among faculty members, that can lead people "to interpret situations and actions differently when the race of the actors varies." *Id.* at 1067. "The stories that African-Americans tell about America—stories of racism and exclusion, brutality and mendacity—simply do not ring true to the white mind." *Id.* at 1069. To ask whites to give credibility to these stories would be "to ask whites to give up too much of what they 'know' about the world." *Id.* Moreover, "[w]hite perceptions of black inferiority cannot be overcome by repressing our implicit recognition of race," but "only when whites *see* blacks as equals." *Id.* at 1108 (emphasis added). It is argued that what qualifies as acceptable research topics is largely defined by the values and experiences of the majority racial group. "Faculty of color voice a common concern that their work is undervalued and that they are treated differently in the academy than their peers." Epps, *supra* note 45, at 769 (quoting Caroline Sotello Viernes Turner & Samuel L. Myers, Jr., *Faculty Diversity and Affirmative Action*, *in* AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION 132 (Mildred Garcia ed., State University of New York Press 1997)). In the humanities, for instance, a minority scholar may have to spend an inordinate amount of time "justifying the inclusion of African-American literature, art, or music in the curriculum." *Id.* Consequently, as Professor

leagues to be tenured, "they are more vulnerable to threats, open or unspoken."[51] Minority faculty also can find themselves deluged with administrative and academic advising duties. Apparently, since there are relatively few minority faculty members, the few that are on staff end up advising and counseling the majority of minority and female students.[52] Moreover, minority faculty are said to be "overburdened with committee responsibilities," since the university wants to staff as many committees as possible with the few minority faculty members available.[53]

Given these arguments, affirmative action policies aimed at faculty composition are essential, because if a diverse faculty does not exist, then the educational benefits of diversity in which the state has a compelling interest cannot occur. But there is a substantial obstacle to faculty diversity, an obstacle much greater than those facing the achievement of student diversity. That obstacle is the tenure system.

In *Grutter*, the Court recognized that since a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race," any race-conscious admissions policy must be limited in duration.[54] The Court accepted the Law School's assertion that it would "terminate its race-conscious admissions program as soon as practicable."[55] However, by limiting the time duration of these affirmative action admissions policies, the Court has imposed a degree of urgency on the matter.[56] Indeed, by even accepting a race-based admissions policy, the Court recognized that the country cannot wait for unregulated social conditions to produce the desired diversity, but rather that racial diversity in the nation's institutions of higher education must

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Epps argues, "the minority scholar is constrained by the culture of the major research university to select research paradigms, research topics, and publication outlets that conform to the traditions of institutions that have historically excluded minorities." *Id.*

51. Chen, *supra* note 41, at 1887. Minority scholars contend that institutions must look beyond the traditional measurements of academic achievement or potential when evaluating minority candidates for faculty positions. *See* Amado M. Padilla, *Ethnic Minority Scholars, Research, and Mentoring: Current and Future Issues*, EDUC. RESEARCHER, May, 1994, at 24-27.

52. *See* Epps, *supra* note 45, at 767 (claiming that minority faculty end up becoming "mentors to many more students than is typical for university faculty"). Because "students looking for supportive role models seek out the limited number of minority (and women) professors for advice and moral support," minority (and women) faculty members find themselves swamped with "writing letters of recommendation and helping with graduate or professional school selection, job and fellowship applications, and post-doctoral research opportunities." *Id.*

53. *Id.*

54. Grutter v. Bollinger, 539 U.S. at 341. According to the Court, the requirement that all race-conscious admissions policies have a termination point "assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." *Id.* (quoting City of Richmond v. J. A. Croson Co., 488 U.S. 469, 510 (1989)).

55. *Grutter*, 539 U.S. at 342. As Justice O'Connor stated, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [of diversity]." *Id.* at 343.

56. *See id.*

come rapidly.[57] Therefore, because the tenure system operates as a huge brake on any significant and immediate progress regarding the compelling interest of diversity, it should likewise suffer the same fate as racially-homogenous student bodies.

At many law schools, more than eighty to ninety percent of the full-time, tenure-track faculty are in fact tenured.[58] This huge overhead of permanently employed faculty members means that only a small fraction of faculty positions open up each year, and it is out of this small number that law schools are attempting to achieve faculty diversity.[59] Quite commonly, at the vast majority of the Nation's law schools, during a student's enrollment not one faculty position will turn over. Consequently, despite the school's professed commitment to diversity and affirmative action among the faculty, absolutely nothing will be done. And because the faculty lags in its diversity, the student body will most probably lag in its diversity, despite all the meticulously drafted race-conscious admissions policies.

IV. THE DIVERSITY ARGUMENT FOR TENURE TERMINATION

Tenure termination may impose some significant effects on a selected group of people.[60] However, these effects are justified, perhaps even mandated, by the very arguments accepted by the Court in *Grutter*.

The quest for diversity of employee personnel would not justify a business corporation firing all its non-minority employees.[61] Yet as

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57. *See, e.g.*, Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 682 (1998) (arguing that "[a]ffirmative action grows out of the frustration with the apparent intractability of this country's inability to achieve [racial equality]"); Chen, *supra* note 41 at 1849 (stating that "[d]eliverance [from the need of affirmative action] cannot come soon enough").

58. The University of Dayton Law School, for instance, reports that 85 percent of its faculty are tenured. *See* http://www.udayton.edu/~vpadmin/fbookfiles/hr/fall03/tenurefac.pdf (n.d.). At St. Mary's Law School, 91 percent are tenured. *See* Gloria Padilla, *Decision to Deny Tenure Sparks Protest at St. Mary's*, SAN ANTONIO EXPRESS-NEWS, April 7, 1999, at 1B.

59. The tenure system "diminishes an institution's opportunity to recruit and retain a younger and more diverse faculty." James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 170 (2000). In over 300 years, for instance, Harvard University has never fired a tenured professor. *Id.* at 173.

As argued in the amicus brief of several deans of prominent national law schools, university education for most students "typically occurs early in life and then ends." Brief of Amici Curiae Judith Areen et al. at 9, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). Therefore, in the case of law school students, their academic legal training is limited to three years. Given the arguments for diversity made in *Grutter*, it is all the more vital that these law students experience a "diversity" legal education as soon as possible. For the rest of their lives, they will be active in business and professional groups and enterprises, but they have only three years in which to avail themselves of all the educational benefits of diversity. This alone should make the need for immediate and complete faculty diversity all the more acute.

60. Some degree of economic hardship is inevitable in any affirmative action program. *See infra* notes 97-110. In desegregation programs, for instance, some students have to endure bussing over long distances in order to achieve school diversity. Swann v. Charlotte-Mecklenburg Bd. of Ed., 362 F. Supp. 1223, 1232 (D.C.N.C., 1973) (acknowledging that the desegregation plan will require many children to be "bussed out of their home neighborhoods, often for long distances").

61. Since Justice O'Connor's *Grutter* opinion focuses on the educational benefits conferred by diversity, and on the need for these benefits to prepare the future leaders of tomorrow, her case

Grutter recognized, higher education is unique. It is a special institution in the social, political and economic life of the nation.[62] Consequently, if only diversity can produce the necessary educational benefits described by the Court, and if the educational system is vital for the sustenance of democracy, then education is an area in which extraordinary measures must be taken to achieve that diversity.

As the Court stated in *Grutter*, the strict scrutiny test requires that any governmental racial discrimination meet two requirements: first, it must serve a compelling state interest; and second, it must be narrowly tailored to meet that interest.[63] Thus, any race-based distinction must be the most narrowly drawn distinction possible.[64] Given this constitutional command, it can be argued that the path toward educational diversity does not wind through the larger and ill-defined pool of potential students, but through the specific and existing faculty staffs of the law schools. Since student diversity is largely dependent on faculty diversity, then the way to achieve the former is to focus narrowly on the latter.

Another reason why tenure should be abolished as a means of achieving more rapid faculty diversity is that the persons who will be most impacted are the persons who in American society most eagerly advocate on behalf of diversity and affirmative action.[65] If there is any fundamental tenet of a democratic society, it is that those adversely affected by a decision should have some say in or agreement with that de-

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for affirmative action would not apply to private businesses. *See also* Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of* Grutter*?*, 92 KY. L.J. 263, 263-64 (2003-2004) (asserting that *Grutter* "does not directly apply to the affirmative use of race or other protected characteristics in the workplace," and that the Court "was careful to limit its discussion to the question" of whether diversity was a compelling interest that can justify the use of race in university admissions policies).

62. *Grutter*, 539 U.S. at 330 (stating that "[w]e have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society") quoting Plyler v. Doe, 457 U.S. 202, 221 (1982). *See also* Brown v. Board of Education, 347 U.S. 483, 493 (1954) (stating that education "is the very foundation of good citizenship").

63. As the *Grutter* opinion stated: "[e]ven in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" *Grutter*, 539 U.S. at 331 (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996)). *See also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 226-27 (1995) (stating that all governmental racial classifications are subject to strict scrutiny).

64. *See Grutter*, 539 U.S. at 331.

65. *See supra* notes 34-38 and accompanying text. Many academics argue that color blindness is a futile delusion because of the past and present race discrimination in America. *See, e.g.*, Stanley Fish, *Reverse Racism or How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY, Nov. 1993, at 128, 130. Others argue that affirmative action is indispensable to alleviate the stigma and prejudice facing minorities in America. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 295-302 (Harvard Univ. Press 1985); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 (1987).

Affirmative action programs at the university level even extend to shaping how scientists conduct their research. For instance, federal law requires that federally-funded research involve women and minorities both as researchers and as subjects of research in clinical studies. *See* Sally L. Satel, *Science by Quota*, NEW REPUBLIC, Feb. 27, 1995, at 14.

cision. And it certainly cannot be argued that the majority of law school faculty do not agree with the need or wisdom of affirmative action.[66]

Many legal scholars claim that race-conscious admissions policies are needed in universities to remedy the blatant racism practiced by those institutions in the past.[67] The courts have long held that affirmative action policies are warranted when governmental agencies—e.g., public universities—have engaged in past racial discrimination.[68] In such cases, diversity as a compelling interest is not even needed to justify the race-conscious remedial actions.[69] Consequently, on the basis of remedying

66. *See* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, YALE L. & POL'Y REV., 1, 9 (2002) (stating that the educational system, like no other domain, "practices and supports [affirmative action] so enthusiastically"). According to a former chancellor at the University of California at Berkeley, a university without affirmative action is akin to educational apartheid, "almost as pervasive and insidious as the strictest segregation in South Africa." Chang-Lin Tien, *Diversity and Excellence in Higher Education*, in DEBATING AFFIRMATIVE ACTION, 237, 239 (Nicolaus Mills ed., Delta 1994). Other scholars argue that affirmative action in higher education is "the best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste." Akhil Amar & Neal Katyal, Bakke's *Fate*, 43 UCLA L. REV. 1745, 1779 (1996). It has been reported that "virtually all competitive law schools" operate "a quota system." Michael S. Greve, *The Newest Move in Law Schools' Quota Game*, WALL ST. J., October 5, 1992, at A12. A former dean of the University of California at Berkeley Boalt Hall Law School has publicly admitted to huge discrepancies in the academic qualifications between blacks and other students. *Id.*

67. *See generally* Brief of Amici Curiae Judith Areen et al. at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241) (stating that "today the Law School argues it would have 'too many' whites if it could not discriminate in its admission process").

68. For instance, to remedy the injuries caused by past discrimination, the courts can impose an affirmative hiring and promotional remedy, which prevails until a designated percentage of minority workers has been reached. *See, e.g.*, United States v. Paradise, 480 U.S. 149 (1987) (holding that "the effects of past discrimination in the Department 'will not wither away of their own accord' and that 'without promotional quotas the continuing effects of this discrimination cannot be eliminated.'" (quoting the District Court in Paradise v. Prescott, 585 F. Supp. 72, 75 (M.D.Ala. 1983); United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) (upholding the police department's mandatory hiring quotas to correct past discrimination); NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974) (holding that police department quota relief was necessary to eliminate unconstitutional past hiring policies).

Courts may also order such remedies against labor unions which have engaged in past racial discrimination. *See* Local 28, Sheet Metal Workers' Int'l. Ass'n. v. EEOC, 478 U.S. 421 (1986) (upholding remedies, including preferential affirmative action hiring and the imposition of substantial fines, to remedy the effects of pervasive past discrimination). In fact, until *Grutter*, the constitutional justification of affirmative action was primarily limited to serving as a remedy for past discrimination. *See Adarand Constructors*, 515 U.S. at 214-20 (recounting the history of Supreme Court decisions on racial discrimination).

As noted earlier in *Hopwood*, the Fifth Circuit ruled that diversity did not constitute a compelling government interest and suggested that perhaps the only governmental interest compelling enough to justify a race-based admissions policy was to remedy the present effects of prior discrimination by that particular governmental body. *Hopwood*, 78 F.3d at 944-46. Consequently, prior to *Grutter*, the only constitutionally compelling interest recognized by the Court that satisfied the strict scrutiny test was the remediation of the effects of past race discrimination. *See* Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990) (holding "modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination").

69. The Court has endorsed the attempts by institutions who voluntarily try to achieve more racial equality, even when there is no direct evidence of previous discriminatory behavior. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 627-31 (1987) (ruling that an employer need not prove its own past discriminatory acts so as to justify its adoption of an affirmative action program, only that the employer demonstrate discrepancies in certain segregated job categories).

past discrimination alone, substantial affirmative action mandates can be imposed—substantial enough to justify the dismantling of tenure.

There is no shortage of statements, testimony, and research by legal scholars regarding the racial discrimination that has existed, and that continues to exist, in the nation's institutions of higher education.[70] These scholars assert that even today, unequivocal symptoms exist "indicating that racial equality has not yet found its way to many institutions of higher education," and that there is "ample evidence that there exists some form of discrimination" even at some of the nation's elite law schools.[71] In both *Hopwood* cases, federal investigators claimed to have found pervasive and egregious discrimination in the recent past of Texas's higher education system.[72] As a University of Texas law professor who also served as counsel for the University in the *Hopwood* cases writes: "[W]e were able to persuade the trial court that the vestiges of discrimination were not merely the lore of a bygone era."[73]

Legal scholars point to the disparity between the percentage of minority students in higher education and the percentage of full-time minor-

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70. *See* Greenberg, *supra* note 39, at 1618 (recalling being told that approximately forty years ago, at a time when some of today's senior legal faculty were obtaining or applying for tenure, the University of Michigan "accepted only one black applicant each year"); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 312 (1990) (describing the burden on blacks of persistent, unconscious racism). Even on racially integrated faculties, Ross argues, a black law professor "must overcome widespread assumptions of inferiority held by students and colleagues, while white colleagues enjoy the benefit of the positive presumption and of the contrast with their black colleague." *Id. See also* Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385 (1986).

See, e.g., Yollander Hardaway, *Affirmative Action: Does the Fifth Circuit's* Hopwood *Ruling Place Affirmative Action on Shaky Ground?*, 122 EDUC. L. REP. 1089, 1101 (1998) (stating that "recent studies concerning minorities and higher education reveal present vestiges of past discrimination"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321 (1987) (arguing that racism is an illness that "infects almost everyone"); Darryl Brown, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 322 (1990) (discussing the "daily repetition of subtle racism and subordination in the classroom and on campus").

Also, Professor Aleinikoff states that racism in America is "widespread, deeply ingrained, passed from generation to generation." T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 352 (1992). "It is becoming increasingly clear . . . that the academic world that many students of color experience . . . [is one] in which minority students feel as if they are outsiders—too often the victims of stereotypical (and essentialist) assumptions and, with increasing frequency, outright racist behavior." *Id.* at 367. "The increase in overt acts of racism on college campuses in recent years is well documented," with professors "often send[ing] similar messages" of racism. *Id.* As Professor Aleinikoff argues, what needs to be changed is "the institutional culture" of universities—a culture that is "overwhelmingly white," in which access "to power hierarchies is generally limited to whites." *Id.* at 369-70.

71. Kent Kostka, *Higher Education,* Hopwood*, and Homogeneity: Preserving Affirmative Action and Diversity in a Scrutinizing Society*, 74 DENV. U. L. REV. 265, 279-80 (1996).

72. Hopwood v. Texas, 861 F. Supp. 551, 555-56 (W.D. Tex. 1994), *rev'd by* 78 F.3d 932 (5th Cir. 1996).

73. Issacharoff, *supra* note 57, at 681 (expressing also his deep skepticism about even those universities that have implemented affirmative action programs). He argues that "it is highly unlikely in this day and age that the institutions of higher education that have heavily internalized a commitment to affirmative action are at the same time remedying their own discrimination." *Id.*

ity faculty as evidence of continuing discrimination.[74] Others accuse universities and law schools of subtly reinforcing racial stereotypes through their use of discriminatory testing and admissions standards.[75] Implicit within these accusations is the larger criticism that racial discrimination is deeply ingrained in America's current system of higher education.[76] As Critical Race Theory proclaims, the standards used to measure achievement in higher education are a "gate built by a white male hegemony that requires a password in the white man's voice for passage."[77]

The faculty of the nation's higher education institutions have been the most vociferous critics of the nation's racial practices and attitudes.[78] They fault society, including institutions of higher education, for not admitting to this racism and to the need for affirmative action.[79] They further argue that minorities are oppressed not just by individual racist attitudes, but also "and more importantly by intractable hierarchical and institutional structures that a more passive, slow-moving non-

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74. *See* Epps, *supra* note 45, at 761. The percentage of minorities in the full-time faculty ranks of higher education is approximately half of the percentage of minorities in the student ranks. *Id.* The persistence of discrimination in higher education can be seen from the fact that "minorities are still tremendously underrepresented in undergraduate and graduate programs nationwide, including law." Kostka, *supra* note 71, at 281. "Socialized biases that extend far beyond formal admission barriers cannot be quantified or eliminated by merely opening up the doors to disadvantaged racial minorities; there still exists a pervasive discriminatory atmosphere in society that disadvantages many, and thus, justifies race-based remedies." *Id.*

75. *See* Rubenfeld, *supra* note 27, at 426. Professor Rubenfeld argues that just as segregating schools was held unconstitutional in *Brown*, so too should "reliance on the SAT, the LSAT, and all the other standardized tests" that unfairly convey the message that minorities cannot compete be found unconstitutional. *Id.* The use by law schools of the Law School Admission Test (LSAT) has been strongly criticized by supporters of affirmative action. The "substantial disparate effect" that the LSAT has on minorities "has been well-documented." Brief of Amici Curiae Society of American Law Teachers at 16, *Grutter*, 539 U.S. 306 (2003) (No. 02-241).

The SAT, it is argued, reflects the country's "legacy of racial injustice." K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE 125 (Princeton Univ. Press 1996). The racial discrimination of the SATs are demonstrated by the fact that "when average SAT scores are broken down by class and race, we also see enormous gaps between black and white students within the same income groups." *Id.* at 140.

76. Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, (1991).

77. *Id.* at 2052. For a description of Critical Race Theory, *see* Tanya Kateri Hernandez, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875, 877 (2003) (arguing that "Critical Race Theory is a strain of legal scholarship that challenges the ways in which race and racial power are constructed and represented in legal culture and, more generally, in society as a whole"). *See also* John O. Calmore, *Random Notes of an Integration Warrior—Part 2: A Critical Response to the Hegemonic "Truth" of Daniel Farber and Suzanna Sherry*, 83 MINN L. REV. 1589, 1592 (1999) (stating that "Critical race theory primarily investigates how the law contributes to and diminishes racial subordination").

78. *See, e.g., supra* notes 65-70 and accompanying text. These sweeping criticisms are reflected in the arguments put forth by respondents in *Grutter*. "The inescapable conclusion is that this is not a 'color blind' society," but one that is "a socially-constructed racial hierarchy with whites firmly on top." Brief of Amici Curiae NAACP Legal Defense and Educational Fund and the ACLU at 22, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). "[R]acial discrimination persists across all class levels and affects even those African Americans with advanced skills and credentials." *Id.* at 19.

79. *See* Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 733 (1999) (stating that it is rarer still that a university "defending a plan [for affirmative action] will be willing to assert its own past discrimination as justification for affirmative measures").

discrimination principle cannot effectively dislodge."[80] Yet despite this comprehensive criticism of the many ways in which higher education discriminates against minorities, faculty members rarely address the problematic tenure system.

The tenure system most likely qualifies as one of those intractable hierarchical and institutional structures that sustains the racial discrimination of the past. Academic tenure was born in a racist age, and if the remnants of discrimination exist everywhere else in society they certainly must in the tenure system.[81] Many currently tenured faculty were awarded tenure at a time when, by the very admissions of faculty members, women and minorities were being shut out. Consequently, it seems logical that tenure as an institutional structure rooted in a past of oppressive racism should suffer the same fate that other remnants of racism have experienced. To the degree that tenure has placed white males into positions of power and privilege—and, given the overwhelming numbers of white male tenured professors, it apparently has—then that instrument of racial privilege should be dismantled. Only then will women and minorities, who have previously been excluded from those positions, finally assume their rightful and long-neglected place.[82]

V. BREAKING DOWN THE TENURE BARRIER TO DIVERSITY

In a way, the academic community has enjoyed a free ride on the racial-virtue train. Faculty members have been eager advocates of affirmative action and, yet, because of tenure they have had to incur no costs or burdens in the social crusade for diversity. Moreover, by adopting the diversity argument, academia has been able to shift focus away from the more backward-looking remedial rationale for affirmative action. This is because the diversity argument incorporates a "future-oriented vision,"[83] and, thus, "ascribes no guilt, calls for no arguments about compensation."[84] So, by supporting affirmative action policies aimed at students and new faculty hires, white male faculty members can

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80. Schuck, *supra* note 66, at 28.

81. The beginnings of tenure in the U.S. higher education system dates back to 1900. *See* Fishman, *supra* note 59, at 165.

82. Institutions of higher education "continue to perpetuate racial disadvantage," Brief of Amici Curiae NAACP Legal Defense and Educational Fund and the ACLU at 3, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). And for "far too long, the doors to those positions [within higher education] have been shut to Negroes." *Id.* at 26.

The Supreme Court has endorsed a narrow version of what could be construed as a restitution argument, permitting affirmative action where identifiable past discrimination has been proved, when this discrimination continues to affect individual victims, and when the racial preference is narrowly tailored to remedy this particular discrimination. Franks v. Bowman Transp. Co., 424 U.S. 747, 777 (1976) (allowing affirmative action to dismantle a seniority status promotion system to remedy prior discrimination); *see, e.g.*, Fullilove v. Klutznick, 448 U.S. 448, 448-49 (1980) (holding affirmative action in federally funded public construction projects constitutional).

83. *See* Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity,"* 1993 WISC. L. REV. 105, 107 (1993).

84. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2060 (1996).

ease whatever guilt or discomfort they might feel on racial issues, while at the same time incurring no risk of being forced to suffer any professional or economic hardship themselves.[85]

Surveys have shown that university faculty tend to be "ideologically and politically far more liberal, Democratic, statist, and secular than other Americans."[86] But their insulation from any adverse effects of affirmative action programs casts a certain suspicion on the arguments of faculty members in support of such programs. They are seen as safely immune from the burdens or consequences of their beliefs. Indeed, most of the Supreme Court's affirmative action decisions have involved not the professional or intellectual classes, but occupations such as police officers and firefighters.[87] The bulk of the judicial affirmative action docket has been directed at, as the Court once described it, "the work of the manual laborer, as distinguished from that of the professional . . . or, indeed, of any class whose toil is that of the brain."[88]

Of course, imposing an affirmative action program that does away with faculty tenure would indeed place some significant burdens on currently tenured faculty. However, such a program may be the only way a university or law school can effectively and immediately achieve the educational benefits of diversity, which constituted the compelling state interest under *Grutter*.[89] If a public university, pursuing the compelling interest of diversity, focused on its faculty make-up and disbanded the tenure system as a means of achieving diversity, it would be exercising

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85. Most university professors "are profoundly uncomfortable at the thought of teaching a class or being on a faculty containing only whites and Asians." Schuck, *supra* note 66, at 36 (adding that "tenured professors have little or nothing to fear personally from affirmative action for students or faculty"). Affirmative action, in fact, benefits tenured faculty "by eliminating the discomfort they would feel in classes and faculty meetings without non-Asian minorities, and they bear few of the program's costs." *Id.*

86. *Id. See also* Rachel Zabarkes Friedman, *Waking Up*, NAT'L REVIEW, October 13, 2003, at 44 (describing student dissatisfaction with "the radical left-wing views of their professors").

87. *See generally* Martin v. Wilks, 490 U.S. 755 (1989) (allowing firefighters to challenge prior consent decrees); *see generally* United States v. Paradise, 480 U.S. 149, 150 (1987) (upholding 50 percent promotion requirement for black state troopers under the Equal Protection Clause); Local No. 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986) (discrimination suit brought by minority firefighters); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (addressing a fire department's suit over racially biased hiring, promotion, and lay-off practices).

88. Rector, etc. of Church of the Holy Trinity v. United States, 143 U.S. 457, 463 (1892).

89. The termination of tenure, for the sake of achieving diversity, could be achieved in two ways. The first, and the one most consistent with the *Grutter* reasoning, would be if the public academic institution itself implemented change. In this way, it could rely upon the academic freedom and educational autonomy justification relied on by Justice O'Connor. The second way, however, would be for the state to abolish tenure. It could do so in the name of the compelling state interest of diversity, which in turn produces educational benefits, which in turn produces better and more enlightened social leaders of the future. Arguably, according to *Grutter*, the state has as compelling an interest in diversity as does the Law School. After all, the benefits of diversity extend far beyond the boundaries of the academic community. They include the development of good democratic citizens, the nurturing of enlightened social and political leaders, and the promotion of racial harmony in society, through the strengthening of trust in minorities that social institutions are open to them. *See Grutter*, 539 U.S. at 328-29 (deferring to law schools' judgment on issues of student admission and diversity).

just the kind of academic freedom cited by Justice O'Connor as one of the reasons for upholding the race-based admissions policy in *Grutter*.[90] Granted, the now untenured faculty members would feel some loss of economic and professional security, but they would all be eligible to reapply for a faculty position under the new affirmative action policy. Moreover, mere economic loss or professional insecurity cannot be a barrier to an interest as compelling as diversity.

Even outside the higher education arena, where diversity is not such a compelling interest, affirmative action programs impose financial and professional costs on nonfavored racial groups. For example, in the field of public and private contracting, laws often impose "set-asides, quotas, and other preferences for minority contractors."[91] Public housing projects are subject to affirmative action mandates; and private developers receiving public funds are often required to implement set-asides or quotas for minority groups.[92] Each year, over 100 million dollars in race-based financial aid is distributed by colleges and universities.[93] In professional schools alone, ten percent of all available scholarship money goes exclusively to minority students.[94] At Harvard University, all minority graduate students receive full tuition, room, and board irrespective of their financial need.[95] Obviously, when this money is given to certain minority students, it is denied to nonminority students, thus causing them to suffer a definite financial injury.[96]

Courts have approved affirmative action programs that levy some economic burdens on nonminority groups. In *United States v. Paradise*,[97] the Court upheld a promotion scheme for the Alabama State Troopers requiring that one African-American be promoted for every one white promotion.[98] In *Fullilove v. Klutznick*,[99] the Court endorsed an affirmative action program that mandated that a certain percentage of government business be awarded to minorities.[100] In *Wittmer v. Peters*,[101] three white candidates who had applied for lieutenant positions in an Illinois correctional boot camp, where nearly seventy percent of the

90. *Id.* at 328.

91. Schuck, *supra* note 66, at 9; *see generally* TAMAR JACOBY, SOMEONE ELSE'S HOUSE: AMERICA'S UNFINISHED STRUGGLE FOR INTEGRATION 9 (Free Press 1998) (attacking modern affirmative action practices).

92. Schuck, *supra* note 66, at 10.

93. Kennedy, *supra* note 35, at 789.

94. *Id.*

95. *Id.*

96. "In an era of diminishing educational budgets, affirmative action quite literally takes the form of preferential finance." Chen, *supra* note 41, at 1899.

97. 480 U.S. 149 (1987).

98. *Paradise*, 480 U.S. at 171 (holding that the "one-for-one promotion requirement was narrowly tailored to serve its several purposes").

99. 448 U.S. 448 (1980).

100. *Fullilove*, 448 U.S. at 473 (in which ten percent of federal construction funds went to minority businesses, so long as the bids were competitively priced).

101. 87 F.3d 916 (7th Cir. 1996).

inmates were black men,[102] sued when a black candidate was selected for the position, even though he had ranked far below the white candidates on an employment test.[103] Conceding that race was a factor in the hiring process, the state defended its decision on the grounds of "penological necessity."[104] The state argued that a black lieutenant was needed because the black inmates "are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp."[105] Similarly, in the university setting, the elimination of tenure can be justified on the basis of educational necessity.

In *United Steelworkers of America v. Weber*,[106] the Court held that private and governmental employers could adopt race-conscious employment policies designed to increase the employment of minorities in jobs where they had been traditionally underrepresented.[107] Also, in *Weber*,[108] the Supreme Court approved of an employer's decision to reserve fifty percent of the openings in a certain training program to black employees.[109] The training program and the reservation of fifty percent of its openings to blacks, according to the Court, was an effort to "eliminate traditional patterns of racial segregation."[110]

These cases establish some precedence for abolishing tenure. First, because the ranks of tenured faculty in higher education have traditionally been racially segregated,[111] very few blacks have held such positions.[112] Additionally, the economic costs incurred by faculty members who have had their tenure status revoked may be no more than the economic costs incurred by nonminority businesses or employees in the above-referenced cases. Indeed, the detenured faculty members may even retain their positions, since there would be no bar to their reapplying. Moreover, given the special nature of education, as recognized in *Grutter*, the achievement of diversity in the nation's universities should justify greater costs than those tolerated in other areas of American life.

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102. *Wittmer*, 87 F.3d at 917.
103. *Id.*
104. *Id.*
105. *Id.* at 920.
106. 443 U.S. 193 (1979).
107. *Weber*, 443 U.S. at 193.
108. *Id.*
109. *Id.* at 197-98.
110. *Id.* at 201.
111. *See* Brian Baskin, *Top Universities Struggle to Hire Black Faculty, Study Shows*, Brown Daily Herald, *at* http://uwire.com/content/topnews030502001.html (Mar. 3, 2002) (citing a study in which, for instance, Brown University was ranked second out of the nation's 27 top schools with 4.1 percent of its tenured professors being black).
112. *See generally*, ASS'N OF AM. LAW SCH., STATISTICAL REPORT ON LAW SCHOOL FACULTY AND CANDIDATES FOR LAW FACULTY POSITIONS (2002-03), *available at* http://www.aals.org/statistics/2002-03/page2.html.

In *Grutter*, Justice O'Connor emphasized that the strict scrutiny standard did not preclude some judicial deference to the Law School's judgment that diversity was essential to its educational mission.[113] Since law schools are "the training ground for a large number of our Nation's leaders,"[114] and since in order "to cultivate a set of leaders with legitimacy in the eyes of the citizenry it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity,"[115] the Court granted a kind of leeway that it has never before granted. What *Grutter* did that *Hopwood* did not do was recognize the incontrovertible nexus between higher education and society.[116] As suggested in *Grutter*, higher education, more than any other profession, is inextricably linked to the social fabric and political processes.[117]

This societal importance of higher education means that the need for diversity is more urgent and immediate than in any other segment of society. Students devote only a few years to higher education, but spend the rest of their lives in their professional, occupational and community roles. Therefore, if students need diversity to become well-rounded citizens and future leaders, then they need it very quickly. Indeed, as critics have pointed out, a nondiverse education can be devastating on students.[118]

Affirmative action programs in the past have often been defeated because of the burden they place on the non-favored racial group.[119] But this burden is different when it comes to tenured faculty in higher education. By revoking their tenure, according to the implied arguments of many scholars, the university is not unduly depriving faculty members of a well-earned property interest as much as it is taking back a discriminatory privilege set up during a period in our nation's past when minorities and women were blatantly excluded. It is argued that the tenure standards and expectations which persist today incorporate the vestiges of past discrimination.[120] Therefore, just as it was wrong for the non-slave

113. *Grutter*, 539 U.S. at 328.

114. *Id.* at 334.

115. *Id.*

116. *See Grutter*, 539 U.S. at 306; *Hopwood*, 78 F. 3d at 932.

117. As also implied by *Grutter*, although the link between government construction contracts and societal discrimination may be ambiguous, higher education provides society with leadership and a forum for the dissemination of ideas. *See Grutter*, 539 U.S. at 332-33.

118. Professor Epps states the scenario:

> The voices of minority and women students may be silenced in different ways. For example, when one speaks up in a class discussion, the professor and white males may listen politely and then continue the discussion as if no comment had been made; or the topics of interest to minority and women students may be considered trivial or peripheral. Exclusion may take the form of not including such students in study groups or cooperative research projects. It may also take the form of denying teaching or research assistantships to students who do not fit the mainstream ideal.

Epps, *supra* note 45, at 765.

119. *See supra* note 87 and accompanying text.

120. *See* Epps, *supra* note 45, at 765. "Unless these types of structural barriers to success are eliminated, it will be difficult to increase the representation of minority and women students in

owning descendants of slave owners to claim innocence while living off the inheritance provided by their ancestors, it is wrong for tenured white male faculty today to advocate for affirmative action while enjoying an academic position that has racist roots.

Legal scholars argue that all of America suffers from "unconscious racism."[121] If this is so, then all of America's institutional structures are tainted with racism. Since tenure is one of the oldest and most powerful structures in American higher education, then it too incorporates the discriminatory effects of unconscious racism and should be abolished.[122] If the academic arguments about racism in America are true, then the tenured faculties in the nation's universities have been among society's biggest benefactors of that racism, since for decades white males have been obtaining lifetime tenure positions at the expense of women and minorities.

Even though tenured teachers have a "property interest in their tenure,"[123] it is not an interest "created by the Constitution."[124] Nor does it rise to the level of a fundamental right protected under the Equal Protection Clause.[125] Consequently, the property interest of a tenured faculty member falls lower on the ladder of constitutional rights than does the equal protection interest of the white applicant in *Grutter*. Thus, if the compelling interest of diversity justifies an infringement of an equal protection right, it certainly can support an infringement of a lower-priority property interest.[126]

Most tenure policies provide for termination in the event of extraordinary instances of "institutional need."[127] Examples of such institutional

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faculty positions. These practices represent a form of institutionalized elitism that makes it difficult for minority and women graduate students to compete on an equal basis with white men." *Id.*

121. *See, e.g.*, Ross, *supra* note 70, at 313 (discussing the ways in which white males are benefited, to the disadvantage of minorities, by society's unconscious racism).

122. In *Croson*, the Court stated that the remedying of past discrimination was the only compelling interest that could justify an affirmative action, set-aside program. City of Richmond v. J. S. Croson Co., 488 U.S. 469, 497 (1989). Racial inequality "has also provided unfair advantages to whites as a group, who have disproportionately benefitted." Brief of Amici Curiae NAACP Legal Defense and Educational Fund and the ACLU at 23, *Grutter*, 539 U.S. 306 (2003) (No. 02-241). Thus, there is the need to "dismantle the institutional protection of benefits for whites that have been based on white supremacy and maintained at the expense of Blacks." *Id.* at 27. Indeed, the argument can be made that the tenure system at a public university represents a state-sponsored policy sustaining the vestiges of racism.

123. Gilbert v. Homar, 520 U.S. 924, 928-29 (1997) (holding that an employee's due process rights had not been violated because due process could be satisfied by a prompt post-suspension hearing).

124. Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 577 (1972) (holding that a professor does not have a protected interest in continued employment when he is merely a contract employee).

125. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (holding that the school board's refusal to renew the teacher's contract did not constitute an equal protection deprivation).

126. The Constitution does not permit a university to "achieve diversity on the cheap." Sedler, *supra* note 39, at 238.

127. *See* Gwen Seaquist & Eileen Kelly, *Faculty Dismissal Because of Enrollment Declines*, 28 J. L.& EDUC. 193, 193 (1999). Such instances of institutional need include declining enrollments and program downsizing. *Id.* at 207.

need include financial emergencies brought on by declining enrollment and severe budget cutbacks.[128] Sometimes, tenure termination is allowed when programs or departments are reorganized.[129] Therefore, if budget shortfalls and department reorganization are sufficient to justify a termination of tenure, then clearly the constitutionally compelling need for diversity can also support such a termination.[130]

VI. CONCLUSION: THE QUEST FOR REAL DIVERSITY

The value of diversity to higher education rests on the same rationale that Justice Holmes first used to justify the protection of unpopular speech.[131] Only through a truly open marketplace of ideas can a democratic society acquire the truth and insights needed to govern itself.[132] Likewise, the diversity that a university community needs is a marketplace-of-ideas diversity, a viewpoint diversity. This is the nature of the diversity recognized by *Grutter* as a compelling state interest.[133]

Higher education is devoted to intellectual development and learning. Consequently, the most valuable diversity is one of intellectual or ideological diversity. Racial diversity is but a proxy for viewpoint diversity.[134] It is a presumptive substitute, based on the theory that people of

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128. The University of Illinois at Chicago tenure policy allows for tenure termination in the event of "grave institutional financial stringency." Jemimah Noonoo, *What is Tenure?* CHICAGO FLAME-NEWS, February 17, 2004, *at* http://www.chicagoflame.com/global_user_elements/printpage.cfm?storyid=222483. Virginia Commonwealth University provides for dismissal of tenured faculty upon a "[b]ona fide financial emergency in a department or school, or reorganization or termination of programs as defined by established University policies and procedures." *Procedure for Termination of Employment of Tenured Faculty Members, at* http://www.vcu.edu/ireweb/policies/tenure.htm. According to the Southern Illinois University tenure policy, a tenured faculty member's employment is subject to "generally applicable amendments to personnel policies of the [university]." *Tenure Policy and Guidelines, at* http://www.siue.edu/PROVOST/FHB/7-16-1.html.

129. *See* Seaquist, *supra* note 127, at 193 (stating that instances of institutional need justifying tenure termination include declining enrollments and program downsizing); *See also Procedure for Termination of Employment of Tenured Faculty Members, at* http://www.vcu.edu/ireweb/policies/tenure.htm.

130. There may be even more reasons to terminate faculty tenure. One prominent criticism is that tenure solidifies and encourages incompetence. According to one study conducted over a three year time period, almost fifty percent of all senior tenured law faculty did not publish anything. *See* Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 381 (1985).

131. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (rejecting the majority's affirmation of a conviction for conspiracy to violate the Espionage Act of Congress).

132. *Abrams*, 250 U.S. at 616.

133. *Grutter*, 539 U.S. at 330 (citing the benefits of diversity as being a "livelier, more spirited, and simply more enlightening and interesting" classroom discussion. *Id.* (quoting Respondents' Brief for Certiorari to the Unites States Court of Appeals for the Sixth Circuit, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 02-241)).

134. *Id.* at 307 (stating that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"). *Id.* (quoting *Bakke*, 438 U.S. at 315). On the other hand, although the University of Michigan Law School purported to consider other types of diversity such as unusual employment experiences and extracurricular activities, race was the most identifiable diversity factor that separates one applicant from another. *Grutter*, 137 F. Supp. 2d at 827-28. But the argument is that educators truly believe that viewpoint diversity strengthens education, they should pursue it

different races have different viewpoints. However, the next step in achieving real diversity is to go beyond using race as a proxy for viewpoint diversity.

With the *Grutter* recognition of diversity as a compelling interest, universities have now been put on notice. They have been told that the nation's future depends on citizens and leaders educated in an academic environment of diverse ideas. They have been empowered to aggressively and creatively pursue this diversity. They have been informed that the compelling interest of diversity can justify infringement of the most fundamental of rights.

Countless scholars have stressed the urgent need for a diverse faculty that can in turn foster a diverse classroom experience and encourage the development of a diverse student body.[135] As these scholars have argued, the ranks of America's higher education faculty are woefully lacking in racial and gender diversity.[136] However, those are not the only areas of diversity that are lacking. Religious diversity is almost nonexistent among university faculty. Eugene Volokh states that "the lack of religious diversity at many schools is at least as severe as the lack of racial diversity."[137] As noted in *The Atlantic Monthly*, "it's appalling that evangelical Christians are practically absent from entire professions, such as academia."[138] But if there is a compelling interest in discriminating on the basis of race so as to promote an educational atmosphere with a supposedly more diverse set of student views, then surely it would be proper and even necessary to discriminate among viewpoints so as to achieve a balanced mix of opinions and beliefs in the faculty and student body. Under the *Grutter* logic of diversity, faculty membership should reflect all viewpoints, even those of religious conservatives.

In addition to a lack of religious diversity, university faculty are also strikingly nondiverse in their political ideology. For instance, law faculty tend to be seventy percent less likely to be Republican than the public at large.[139] A study of several universities found that nearly 90 percent of liberal arts professors were Democrats.[140] Thus, if universities

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directly rather than using race as a proxy. *Id.* at 849-50 (explaining that viewpoint diversity may be equally attainable by non-minority students).

135. *See supra* notes 34-38 and accompanying text. *See also* White, *supra* note 34.

136. *See* Baskin, *supra* note 111.

137. Volokh, *supra* note 84, at 2072. Professor Volokh estimates that law school faculty are approximately 75 percent less likely to attend religious services than the public at large. *Id.* at 2072.

138. David Brooks, *People Like Us*, THE ATLANTIC MONTHLY, September, 2003, at 32.

139. Volokh, *supra* note 84, at 2073 n. 23.

140. Brooks, *supra* note 138, at 32. Of the forty-two professors in the English, history, sociology, and political-science departments at Brown University, all were Democrats. *Id.* In his dissent in *Grutter*, Justice Kennedy recounted the testimony of one law school dean who described a faculty debate whether Cubans should be counted as Hispanics: "[o]ne professor objected on the grounds that Cubans were Republicans." *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). A study of various university faculties showed that at Cornell the ratio of liberal to conservative faculty members was 166 to 6, at Stanford it was 151 to 17, at UCLA it was 141 to 9, and at the University of

can discriminate on the basis of race to achieve diversity, they should be able to discriminate on the all-important basis of political ideology. If they require themselves to screen faculty candidates for racial and gender diversity, they should surely be required to screen for viewpoint diversity. In pursuit of the cause of diversity, and extending the logic of *Grutter*, perhaps the content of libraries or the content of law review articles should be monitored or regulated so as to achieve the proper balancing of viewpoints. Certainly the types of books available in a school library have a significant effect on the educational environment of the school, as well as on the liveliness and nature of discussion in the classroom.

Colorado it was 116 to 5. Jeff Jacoby, "Intellectual Diversity," *Townhall.com*, December 5, 2004 at www.townhall.com/columnists/jeffjacoby/printjj20041204.shtml. A poll of Ivy League professors had liberals outnumbering conservatives by more than ten to one. *Id.* And in a survey of more than 1700 social science professors, a Santa Clara University researcher found that between 80 and 90 percent identify as 'liberals' and vote Democratic. David Horowitz, "It's Time for Fairness and Inclusion in Our Universities," *FrontpageMagazine.com*, December 14, 2004, at www.frontpagemag.com/articles/printable.asp?ID=16301. The same study showed that among junior faculty at Stanford and Berkeley, the ratio of liberals to conservatives was 30 to 1. *Id.*

BEYOND *LANE*: WHO IS PROTECTED BY THE AMERICANS WITH DISABILITIES ACT, WHO SHOULD BE?

RUSSELL POWELL†

I. INTRODUCTION

When the Americans with Disabilities Act[1] (the "Act" or the "ADA") was enacted in 1990, many disability rights advocates expected that it would usher in a new era of equal opportunity and acceptance for people with disabilities.[2] Written in the tradition of both the Rehabilitation Act of 1973[3] and the Civil Rights Act of 1964,[4] the ADA reflected the ideal of distributive justice in its mandate to both counter discrimination and provide accommodation;[5] however, the courts gradually narrowed its coverage.[6] Some empirical studies assert that the ADA actually caused a decline in the rate of employment among people with disabilities.[7] By early 2000, some scholars predicted that the ADA would fade into obscurity as an ill-conceived relic that failed to adequately anticipate social costs and the rational choices of employers and people with disabilities.[8]

However, the ADA received new vigor from the Supreme Court with the May 2004 opinion, *Tennessee v. Lane*.[9] In a 5-4 decision, the Court affirmed that Congress validly exercised its power when it subjected states to suits under the ADA, at least with regard to limitations on access to courts.[10] While the decision addresses Title II of the ADA,[11] it does have broader implications for the Act as a whole. *Lane* reflects a

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1. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2000).
2. Leslie Francis & Anita Silvers, *Introduction* to AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS xiii, xix (Leslie Pickering Francis & Anita Silvers eds. 2000) [hereinafter Francis & Silvers].
3. *See* 29 U.S.C. §§ 706, 794 (2000).
4. *See* 42 U.S.C. § 7000e (2004).
5. S. REP. NO. 101-16, at 2 (1989).
6. James Leonard, *Symposium: The American with Disabilities Act: A Ten-Year Retrospective: The Shadows of Unconstitutionality: How the New Federalism May Affect the Anti-Discrimination Mandate of the Americans with Disabilities Act*, 52 ALA. L. REV. 91, 91-92 (2000).
7. *See* discussion *infra* Part IV.
8. Thomas DeLeire, *The Unintended Consequences of the Americans with Disabilities Act*, Regulation, 2000, Vol. 23, No. 1 at 24.
9. 124 S. Ct. 1978 (2004).
10. *Lane*, 124 S. Ct. at 1994.
11. 42 U.S.C. §§ 12131-12165.

significant shift in the ethical paradigm used by the Court to decide ADA cases and creates the opportunity to re-open dialogue about the real policy goals of the ADA and broader questions of justice for those with disabilities. Analysis of the measurable impact of the ADA continues and results in sometimes conflicting assertions. But whatever conclusions are ultimately proven, the question of our policy goals and our conception of justice for people with disabilities must be distinguished from the judicial and legislative tools intended to achieve those goals.

The ADA's legislative history makes it clear that it was intended to address the social issues associated with discrimination as well as accessibility issues for those with physical impairments.[12] The Supreme Court's emphasis on impairment and the notion of a discrete and insular minority found in civil rights legislation has transformed the scope of the ADA found in its plain meaning. The result is that some claimants who fall within the intended and literal scope of the ADA do not receive the benefit of its protection.[13] Furthermore, states have largely been exempted from the requirements of the ADA,[14] *Lane* notwithstanding.

Under Title I (the ADA's employment provisions),[15] even those who can make a successful claim may be caught in the catch-22 of winning a case but being terminated because their impairment makes them unemployable.[16] Although those who care for the disabled are not expressly covered by any part of the ADA, it is arguable that they constitute a vulnerable class which should receive fair compensation and perhaps legal protections under the ADA (though admittedly this might be more appropriately addressed under a different legislative aegis).[17] For these reasons, this paper recommends a reconsideration of the ADA's goals and a review of its effectiveness. While such a project is broader than the scope of this paper, its ultimate conclusions may necessitate changes in disability policy and justify substantial amendments to the ADA which would better-serve the original legislative intent and the interests of the disabled.

Part II of this article comments on the scope of the ADA in its statutory language, its legislative history, the regulations intended to provide clarification and the history of major Supreme Court decisions interpreting it. Part III reflects on the philosophical paradigms that appear to be

12. Lowell P. Weicker, Jr., *Historical Background of the ADA*, 64 TEMP. L. REV. 387, 387-89 (1991) [hereinafter Weicker].

13. Claudia Center & Andrew J. Imparato, *Redefining "Disability" Discrimination: A Proposal to Restore Civil Rights Protections for All Workers*, 14 STAN. L. & POL'Y REV. 321, 321-22 (2003) [hereinafter Center & Imparato].

14. Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001).

15. 42 U.S.C. §§ 12111-12117 (2004).

16. Ronald Turner, *The Americans with Disabilities Act and the Workplace: A Study of the Supreme Court's Disabling Choices and Decisions*, 60 N.Y.U. ANN. SURV. AM. L. 379, 409 (2004).

17. Mary Mahowald, *A Feminist Standpoint*, *in* DISABILITY, DEFERENCE, DISCRIMINATION, 209, 239-50 (Anita Silvers et. al. eds., 1998) [hereinafter Mahowald].

operative in the creation and interpretation of the ADA. The concerns raised by some of the major empirical studies and recommended new areas for research are addressed in Part IV. Part V comments on possible revision of the ADA to create effective and legally valid incentives that better achieve national justice goals.

II. SCOPE OF THE ADA

The scope of the ADA is not self-evident. The text of the statute and its legislative history created high expectations.[18] In general, the regulations implementing the ADA reinforced these expectations.[19] However, the case law, particularly at the Supreme Court level, has curtailed those expectations by narrowing the definition of disability and by according state governments a significant degree of immunity.[20]

A. The Statute

The ADA is divided into five separate titles, four of which provide rights of action.[21] Title I contains employment antidiscrimination provisions intended to protect the disabled.[22] Title II requires that state and local governments provide all public programs, activities and services without discriminating on the basis of disability.[23] Title III prevents private entities that provide public services from discriminating on the basis of disability.[24] Title IV requires telecommunications companies to provide equipment and services for the hearing and speech impaired.[25] Lastly, Title V contains miscellaneous interpretive provisions and dispute resolution clauses.[26]

The ADA describes a disability as "a physical or mental impairment that substantially limits one or more of the [individual's] major life activities."[27] In theory, the protection of the ADA also extends to those who are regarded as having a disability or who have a record of disability.[28] Although Title I protection should theoretically be extended in

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18. Richard K. Scotch, *Making Change: The ADA as an Instrument of Social Reform, in* AMERICANS WITH DISABILITIES: EXPLORING THE IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 275, 276 (Leslie Pickering Francis & Anita Silvers eds. 2000) [hereinafter Scotch].

19. *See infra* notes 41 and 50.

20. *See* Center and Imparato, *supra* note 13, at 324-29.

21. Americans with Disabilities Act, §§ 42 U.S.C. 12101-12213.

22. 42 U.S.C. §§ 12111-12117 (2004).

23. 42 U.S.C. §§ 12131-12165 (2004).

24. 42 U.S.C. §§ 12181-12189 (2004).

25. 47 U.S.C. § 225 (2004).

26. 42 U.S.C. §§ 12201-12213 (2004).

27. The Americans with Disabilities Act, § 3(2)(A) (1990) [hereinafter ADA]. Quoting all of Section 3(2), "Disability—The term 'disability' means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *Id.* at §3(2)(A)-(C).

28. *Id.* at § 3(2)(B) & (C). These sections clearly address the issue of discrimination as distinct from impairment. Those who have a record of disability would include disabled persons who no longer have a disability, but who still suffer from discrimination. For example, someone who

these cases according to the language of the statute, it has not been due to the narrow definition of disability used by the Supreme Court.[29] The legislative history of the ADA refers to 43 million as the hypothetical number of Americans living with disabilities in 1990.[30] In an effort to limit the scope of the ADA by including no more than that estimated 43 million people, the Court has required proof of severe physical or mental impairment, usually construed as a specific medical disorder, whether caused by genetics, injury or disease.[31]

B. Legislative History

Historically, the ADA is the logical extension of the protections of section 504 of the Rehabilitation Act.[32] Where the Rehabilitation Act only protected against discrimination by groups receiving federal funding,[33] Title I of the ADA applies in theory to nearly all private and state entities. Disability rights groups lobbied extensively for these protections in the 1988 presidential race.[34]

To fulfill expectations for new and more expansive disability anti-discrimination protection, a joint hearing was held before the Senate Subcommittee on Disability Policy and the House Subcommittee on Select Education in September 1988.[35] Many people with disabilities testified before the overflowing room about architectural and communication barriers and the pervasiveness of stereotyping and prejudice.[36] Senator Kennedy, Chair of the Labor and Human Resources Committee, Senator Harkin, Chair of the Subcommittee on Disability Policy, and Representative Owens of the House Subcommittee on Select Education committed themselves to passing a comprehensive disability civil rights bill.[37] Over the following two years, a significant body of testimony and statistics was presented to Congress and became a part of the legislative record of the ADA. While the legislative record strongly indicates Congressional

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suffered from a disabling disease that has been cured, may still suffer discrimination as a person who had a stigmatizing disease. Similarly, someone may suffer discrimination for being perceived as disabled even if she is not. Also, someone may be discriminated against because she is believed to suffer from a disabling disease, even if she does not.

29. *See* Center and Imparato, *supra* note 13, at 324-29.

30. 42 U.S.C. § 12101 (2004).

31. This is a reference to the so-called "medical model" of disability. *See* Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing the Three Faces of Reasonable Accommodation*, 35 U.C. DAVIS L. REV. 1175, 1214 (2002) [hereinafter Pendo I]; *See generally* Joel Feinberg, *Disability and Illness*, in AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 244 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) (challenging the alleged objectivity of medical diagnoses as a basis for demonstrating disability discrimination) [hereinafter Feinberg].

32. *See* 29 U.S.C. §§ 701, 794.

33. 29 USC § 794(a) (2004).

34. Francis & Silvers, *supra* note 2, at xix.

35. Weicker, *supra* note 12, at 391.

36. Francis & Silvers, *supra* note 2, at xix.

37. Weicker, *supra* note 12, at 391.

intent for broad protections,[38] the Supreme Court has largely ignored it.[39] Extensive references to the legislative history of the ADA in *Lane* indicate that such evidence of Congressional findings and intent are once again significant.[40]

C. Regulations

Within one year of the ADA's passage, Congress authorized the Equal Employment Opportunity Commission ("EEOC") to issue regulations implementing Title I.[41] The most important definitions proffered are "physical or mental impairment,"[42] "substantially limits,"[43] and "major life activity."[44] However, both *Sutton v. United Airlines*[45] and *Toyota Motor Manufacturing v. Williams*,[46] further described below, convincingly call into question the validity of these regulations.[47] Thus, while they may be instructive, the EEOC regulations are today accorded little deference.[48] As a result, the definition of "disability" is largely the product of judicial opinions, and the assertion that a plaintiff is not a "quali-

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38. 42 U.S.C. § 12101(b) (2004).

39. Sutton v. United Airlines, 527 U.S. 471, 482 (1999). "[The dissent] relies on the legislative history of the ADA for the contrary proposition that individuals should be examined in their uncorrected state. *See* Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 10-18 (2000). Because we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history." *Id.*

40. *Lane*, 124 S. Ct. at 1984-92.

41. 42 U.S.C. § 12116 (2004).

42. Regulations To Implement The Equal Employment Provisions of the Americans With Disabilities Act, 29 C.F.R. § 1630.2(h) (2004).

> (1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine; or (2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Id.

43. *Id.* at § 1630.2(j)(1) (2004).

> The term substantially limits means: (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

Id.

44. *Id.* at § 1630.2(h)(2)(i) (2004). "Major Life Activities means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Id.*

45. *See generally* Sutton v. United Airlines, Inc., 527 U.S. 471, 482-83 (1999) (discussing that no agency has been delegated authority to interpret the term "disability").

46. *See generally* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002) (substituting a more restrictive interpretation of "substantially limits" in place of the EEOC's definition of that element).

47. Lisa Eichhorn, *The* Chevron *Two-Step and the* Toyota *Sidestep: Dancing Around the EEOC's "Disability" Regulations under the ADA*, 39 WAKE FOREST L. REV. 177, 180 (2004) [hereinafter Eichhorn].

48. *Id.*

fied person with a disability" is the most common defense in ADA employment cases.[49]

The Department of Justice ("DOJ") issued regulations implementing Title II with the intention of harmonizing them with Title VII civil rights regulations.[50] These regulations provide detailed standards for state and local government compliance with the antidiscrimination provisions of Title II.[51] Notably, they provide specific guidelines for access to courtrooms, the very question posed by *Lane*[52] discussed below.[53]

Since the definition of disability in the ADA was based on the three-pronged definition in the Rehabilitation Act of 1973 (including impairment, a record of impairment and being regarded as having an impairment), courts have used regulations originally drafted by the Department of Health, Education and Welfare implementing the Rehabilitation Act to interpret terms in the ADA.[54] These regulations, now under the auspices of the Department of Health and Human Services ("DHHS"), are particularly important in defining "major life activities."

D. Supreme Court Jurisprudence

The ADA has been limited in several ways. Most significantly, the Supreme Court has narrowed the scope of ADA coverage by limiting the definition of a qualified person with a "disability."[55] Congress clearly intended to protect from discrimination those with epilepsy, diabetes, mental health conditions, amputees and others who are able to mitigate the effects of their impairment.[56] However, claims on the basis of these disabilities are "routinely dismissed as outside the protection of the statute."[57] Title I cases against states universally fail to overcome Eleventh Amendment immunity although *Tennessee v. Lane* has notably upheld Title II at least with regard to court access.[58] This is significant in that it represents a trend toward judicially limiting the scope and protections of the ADA.[59] Presuming that the current Supreme Court will not radically shift its position in favor of greater protection for the disabled, any real change must originate in Congress, must provide measurable results and

49. Susan Stefan, *Delusions of Rights: Americans with Psychiatric Disabilities, Employment Discrimination and the Americans with Disabilities Act*, 52 ALA. L. REV. 271, 303 (2000).

50. 28 C.F.R. § 35 (2004).

51. *Id.*

52. Tennessee v. Lane, 124 S. Ct. at 1979.

53. *See generally* 28 C.F.R. § 35.102, 35.104 (2004) (providing definitions for interpretation of the ADA, which apply to all services, programs, and activities provided or made available by public entities).

54. Eichhorn, *supra* note 47, at 182-83.

55. Center & Imparato, *supra* note 13, at 322.

56. *Id.* at 321.

57. *Id.* at 322.

58. *Lane*, 124 S. Ct. at 1980-82 (2004).

59. Scotch, *supra* note 18, at 279.

must be calculated to pass constitutional muster under the prevailing precedents.

1. The First Cases

Many of the earlier ADA cases provided clarification and tended to narrow the protections of the Act, creating a complex and often inconsistent set of rules.[60] One of the great challenges facing the Supreme Court in its ADA decisions has been reconciling the perceived need for clear rules with the tragic circumstances faced by many ADA claimants.

Some of the first Supreme Court cases interpreting the ADA seemed to uphold the scope of the Act indicated by its text and legislative history. *Bragdon v. Abbott*[61] asserted that an individual with HIV is considered a person with a disability even in the beginning stages of the disease.[62] While somewhat controversial at the time, this result was clearly intended by some in Congress.[63] *Cleveland v. Policy Management Systems Corporation*[64] declared that it is not a contradiction of terms when an individual claims to be "totally disabled" in order to collect Social Security Disability Insurance, and at the same time is able to perform the essential functions of a job under the ADA.[65] However, this rule has only been distinguished in reported federal cases, never followed.[66] *Pennsylvania Department of Corrections v. Yeskey*[67] declared that state prisons are state entities subject to the requirements of Title II of the ADA,[68] and that entities operating as extensions of state power are subject to Title II unless state immunity would apply.[69]

In 1999, there appeared to be a shift in Supreme Court decisions, significantly narrowing the protections of the ADA.[70] However, *Olmstead v. L.C.*[71] found that under Title II of the ADA it is appropriate to place people with mental disabilities in community-based settings when such placement is deemed appropriate by the state's treatment professionals.[72] The Court required that the State of Georgia provide these

60. Center & Imparato, *supra* note 13, at 325-26.
61. 524 U.S. 624 (1998).
62. *Id.* at 637.
63. 136 Cong. Rec. S. 9684 (1990).
64. 526 U.S. 795 (1999).
65. *Id.* at 798-99.
66. A Shepard's report was run using LEXIS on January 17, 2005.
67. *Yeskey*, 524 U.S. at 210.
68. *Id.* at 210.
69. Laurence Paradis, *Symposium: Development in Disability Rights: Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making Programs, Services and Activities Accessible to All*, 14 STAN. L. & POL'Y REV. 389, 395 (2003).
70. *See infra* notes 79, 80 and 81.
71. 527 U.S. 581 (1999).
72. *Id.* at 607.

alternatives to institutionalization so long as the costs remain reasonable.[73]

There have been a few very narrow decisions that have upheld ADA protection in highly disputed cases since 1999. *PGA Tour, Inc. v. Martin*[74] was decided after Sutton and its sibling cases, but it reflects a more expansive reading of the ADA. It required that the PGA allow Casey Martin to ride in a golf cart rather than walk the course during PGA tournaments.[75] The Court held that riding does not fundamentally alter the nature of the game and must be allowed to accommodate the disabled under Title III.[76] The ruling was so specific that it is unclear what sort of fact patterns would be governed by this precedent.[77]

Abbott, Policy Management Systems Corp., Yeskey, and *Martin* generally indicate a desire by the Supreme Court to protect those they perceive as being truly disadvantaged, a group that seems to be limited in these later cases to those without the ability to see, hear or walk.[78] However, the inconsistency in applying the original intent of Congress in enacting the ADA has created a patchwork of rules resulting in actual and perceived inequity in the judicial treatment of different groups of disabled people.

2. The *Sutton* Trio

Three related cases, *Sutton v. United Airlines*,[79] *Murphy v. U.P.S.*[80] and *Albertson's, Inc. v. Kirkingburg*[81](the "*Sutton* Trio"), decided on the same day in 1999, further limited the protections afforded by the ADA. *Sutton v. United Airlines* held that in order to determine if an individual is disabled within the meaning of the ADA, it is important to take into account any corrective measures the individual with the impairment employs.[82] Therefore, individuals who are able to correct their vision to 20/20 or better with eyeglasses are not to be considered disabled.[83] In a similar manner, *Murphy* relied on *Sutton* to conclude that the petitioner's high blood pressure could not be considered a disability when he was taking medication that effectively controlled it.[84] *Kirkinburg*, the third case of the *Sutton* Trio, concluded that cases questioning the existence of

73. *Id.* at 587.
74. 532 U.S. 661 (2001).
75. *Id.* at 661-62.
76. *Id.* at 690.
77. David A. Monaghan, *Title III of the ADA Allows a Qualified Disabled Entrant to Use a Motorized Cart on the Professional Golf Tour:* PGA Tour, Inc. v. Martin, 40 DUQ. L. REV. 403, 425 (2002).
78. *Toyota Motor Mfg.*, 534 U.S. at 195.
79. 527 U.S. 471 (1999).
80. 527 U.S. 516 (1999).
81. 527 U.S. 555 (1999).
82. *Sutton*, 527 U.S. at 482.
83. *Id.* at 481.
84. *Murphy*, 527 U.S. at 521.

a disability must be examined on a case-by-case basis regarding whether an individual is impaired in any major life activities.[85]

There are two significant problems with these three decisions. First, the Supreme Court has reinforced an "objective" medical standard for disability.[86] Second, "disabilities" that are correctable by device or medication do not qualify as protected disabilities under the ADA.[87] This rule was promulgated as a rejection of the claim that correctable vision constitutes a protected disability.[88] Although Justice Scalia rejected the inclusion of correctable vision problems as overly broad,[89] Justice Ginsburg took a more nuanced approach, noting that "[P]ersons whose uncorrected eyesight is poor, or who rely on daily medication for their well-being, can be found in every social and economic class; they do not cluster among the politically powerless, nor do they coalesce as historical victims of discrimination."[90]

Thus the Supreme Court has interpreted the purpose of the ADA in the context of its goal to protect the "disabled" as an insular minority characterized by political and economic disadvantage.

3. *Toyota Motor Manufacturing v. Williams*[91]

In *Toyota Motor Manufacturing v. Williams*, respondent Ella Williams claimed that her employer, Toyota, had violated Title I of the ADA by not providing a reasonable accommodation for her claimed disability, which included the inability to hold her arms at shoulder height for hours at a time.[92] Toyota successfully argued that the claimed disability only prevented Ms. Williams from performing the sort of manual labor required for her job and would not constitute a substantial disability with regard to a broad range of jobs.[93] Significantly, the Court issued a unanimous decision.[94]

The key question before the Court was whether the inability to perform manual tasks that are not necessarily encountered in daily living,

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85. *Kirkingburg*, 527 U.S. at 556.

86. *See* Pendo I, *supra* note 31, at 1214; David Wasserman, *Stigma Without Impairment: Demedicalizing Disability Discrimination*, *in* AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 146, 149 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) [hereinafter Wasserman].

87. *Sutton*, 527 U.S. at 488.

88. *Id.* at 487-88.

89. Wasserman, *supra* note 86, at 146.

> Justice Scalia removed his glasses and waved them in the air. He was making the point that if mitigation were ignored, he, along with millions of other Americans, would be swept into the category of "disabled," swelling its ranks far beyond the 43 million recognized by Congress when it adopted the statute . . . .

Id.

90. *Id.* at 147.

91. 534 U.S. 184 (2002).

92. *Id.* at 189.

93. *Id.* at 200.

94. *Id.* at 184.

but are required in some jobs, "substantially limits" a "major life activity."[95] If not, Ms. Williams could not be considered a "qualified individual with a disability" for the purposes of the ADA.[96] What is clear from the opinion is that the Court presumptively considers substantial impairments of the major life activities of walking, seeing and hearing as the clearest indications that a person is qualified to make a disability claim under Title I.[97] In quoting the DHHS regulations for the Rehabilitation Act defining "major life activities" which include such relevant categories as "performing manual tasks," the Court singles out "walking, seeing, [and] hearing."[98] The Court seems to be seeking a bright line test for eligibility, and blindness, deafness and the inability to walk provide a clear standard.

In stark contrast, the description of carpal tunnel syndrome from which the respondent suffered seems to trivialize the diagnosis without regard to her specific condition.[99] The Court reiterates its claim that Congress limited the ADA's scope to the 43 million it considered disabled.[100] If only those unable to see, hear or walk are presumptively disabled under the ADA and thus protected by Title I, then the number of those considered disabled in 1990 would only have been approximately 3.22 million.[101] Clearly, Congress intended to protect a broader class of people. Even so, *Sutton* and the other cases from the 1999 term had narrowed the scope of ADA coverage to the extent that no Justice dissented to the similar standard proposed in *Williams*.[102]

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95. *Id.* at 196.

96. *Id.* at 191.

97. *See id.* at 191-96.

98. *Id.* at 195.

99. *Id.* at 199.

> While cases of severe carpal tunnel syndrome are characterized by muscle atrophy and extreme sensory deficits, mild cases generally do not have either of these effects and create only intermittent symptoms of numbness and tingling. Studies have further shown that, even without surgical treatment, one quarter of carpal tunnel cases resolve in one month, but that in 22 percent of cases, symptoms last for eight years or longer . . . . Given these large potential differences in the severity and duration of the effects of carpal tunnel syndrome, an individual's carpal tunnel syndrome diagnosis, on its own, does not indicate whether the individual has a disability within the meaning of the ADA.

Id.

100. *Id.* at 197.

101. According to Chiang, Bassi & Javitt there were 1,103,600 legally blind Americans in 1990. *Prevalence of Vision Impairment: National Estimates*, *at* Lighthouse International: Statistics on Vision Impairment, *at* http://www.lighthouse.org/vision_impairment_prevalence_older.htm (last viewed Oct. 10, 2004). In 1990, 552,000 Americans were unable to hear or understand speech. *Prevalence and Characteristics of Persons with Hearing Trouble: United States, 1990-1991: Series 10: Data from the National Health Survey, No. 188*, at Table C, *available at* U.S. Department of Health and Human Services, http://www.cdc.gov/nchs/data/series/sr_10/sr10_188.pdf (Mar. 1994). There are 1,564,000 people in the United States using wheelchairs. *National Health Interview Survey on Disability (NHIS-D) for 1994*, at Table 1, *available at* National Center for Health Statistics, http://www.cdc.gov/nchs/about/major/nhis_dis/ad292tb1.htm (last viewed Oct. 10, 2004).

102. *Toyota*, 534 U.S. at 184.

4. *Chevron v. Echazabal*[103]

The second major ADA case of the October 2001 term is *Chevron v. Echazabal*. Like *Williams*, it was a unanimous decision and reinforced the narrowing of ADA protection.[104] However, instead of raising the standard for disability qualification, *Echazabal* gives employers greater latitude to fire or deny employment on paternalistic grounds.[105] That is, if the employer determines that employment poses a risk to the disabled employee, it has discretion to dismiss the employee.[106] Mr. Echazabal was diagnosed with a liver disease which could have been exacerbated by continued employment at a Chevron petrochemical refinery.[107] Upon the advice of his doctor, Mr. Echazabal determined that his potential health risk was minimal and decided to continue in his job.[108] Chevron fired Mr. Echazabal due to the potential risk to his health on the basis of EEOC regulations which were interpreted to allow a threat-to-self defense.[109]

Echazabal created a new catch-22 for people with disabilities. While it had been earlier decided that qualified persons with disabilities who require accommodations are not afforded ADA protection if such accommodations are not reasonable (i.e. demonstrating disability status provides grounds for dismissal or failure to hire),[110] employers may also terminate or fail to hire a person whose disability poses a potential risk to him or herself even if no accommodation is requested.[111] While the ADA was enacted to prevent employer paternalism in the form of discrimination, the Court reasoned that the threat-to-self defense reflected a different and acceptable form of paternalism.[112]

This decision is problematic to the extent that it is at odds with the goals of integration and self-determination, but it provides a bright line rule to protect employers who would assume known risks to employees, particularly when such personal injury risk might not be waivable. The unanimity of the Court implies that it is willing to allow paternalism in the name of judicial efficiency so long as it does not appear overly discriminatory.

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103. 536 U.S. 73 (2002).
104. *Echazabal*, 536 U.S. at 73.
105. D. Aaron Lacy, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 SANTA CLARA L. REV. 55, 84-85 (2003).
106. *Echazabal*, 536 U.S. at 74-75.
107. Echazabal v. Chevron USA, Inc., 226 F.3d 1063, 1065 (9th Cir. 2000).
108. *Echazabal*, 226 F.3d at 1065.
109. *Id.*
110. Sch. Bd. Of Nassau County v. Arline, 480 U.S. 273, 287 (1987) (finding that tuberculosis qualifies as a "handicap" under the Rehabilitation Act but that the threat of contagion could disqualify an individual from protection).
111. *Echazabal*, 536 U.S. at 86.
112. *Id.* at 85.

5. *U.S. Airways v. Barnett*[113]

U.S. Airways v. Barnett addresses the conflict between seniority hiring systems and requests for accommodation. Mr. Barnett was a baggage handler for U.S. Airways until he injured his back.[114] He was then transferred to a mail room position within the company for a period of time.[115] However, U.S. Airways decided to make the position available through its seniority system.[116] Barnett requested to stay in the position as a reasonable accommodation of his disability.[117] U.S. Airways argued that circumventing a seniority system negotiated with labor was not a reasonable accommodation and fired Barnett.[118] The Court agreed that this was a valid, though rebuttable, presumption.[119]

The most troubling fact in the case is that Barnett's position in U.S. Airways' mailroom was not a vacant position that the company needed to fill.[120] Barnett's only request for accommodation was to remain in the position to which he had been transferred.[121] However, the rule given by the Court does give employees with disabilities the opportunity to overcome the presumption by showing "special circumstances" that make disregarding a seniority system a reasonable accommodation.[122]

The dissents to key portions of the decision are quite different. Justice Scalia's dissent, in which Justice Thomas joins, rejects the Court's rule that allows a case-by-case analysis even though it creates a presumption in favor of employers.[123] Justice Souter's dissent is joined by Justice Ginsburg, and it rejects the notion that seniority rules ought to be insulated from the ADA requirement for reasonable accommodations.[124] Not surprisingly, these reactions seem to reflect the expected policy preferences of the Justices.[125] While *Barnett* does not fully resolve the competition between seniority systems and the ADA, it does not represent the kind of clear erosion of disability rights seen in *Sutton* or *Williams*.

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113. U.S. Airways v. Barnett, 535 U.S. 391 (2002).
114. *Barnett*, 535 U.S. at 391.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 406.
120. *Id.* at 423.
121. *Id.* at 391, 423.
122. *Id.* at 405.
123. *Id.* at 419-20 (Scalia, J., dissenting).
124. *Id.* at 423-24 (Souter, J., dissenting).
125. *See generally* Youngsik Lim, *An Empirical Analysis of Supreme Court Justices' Decisionmaking*, 29 J. LEGAL STUD. 721 (2000), and Frederick Schauer, *Lecture: Incentives, Reputation and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615 (2000).

6. *Tennessee v. Lane*[126]

The most recent Supreme Court case addressing the ADA is *Tennessee v. Lane*. The respondents, George Lane and Beverly Jones, are both paraplegics who use wheelchairs.[127] Lane crawled up two flights of stairs to make an appearance to respond to criminal charges in a courthouse that had no elevator.[128] When he returned for a hearing, he refused either to crawl or be carried to the courtroom and was arrested and jailed for failure to appear.[129] Beverly Jones, a certified court reporter who relied on access to courtrooms for her livelihood and was unable to gain access to a number of county courthouses, joined in the action challenging the State of Tennessee pursuant to Title II of the ADA.[130]

Tennessee moved to dismiss the suit at the District Court level on the grounds of Eleventh Amendment immunity.[131] The District Court denied the motion, and Tennessee appealed the decision to the Sixth Circuit Court of Appeals.[132] The Sixth Circuit ultimately affirmed the denial of dismissal on due process grounds.[133] Since the Supreme Court had ruled in *Bd. of Tr. of the Univ. of Ala. v. Garrett*[134] that states were immune from Title I liability despite equal protection concerns, some commentators expected Eleventh Amendment immunity to be extended to all Title II suits.[135] However, in a 5-4 decision drafted by Justice Stevens, the Supreme Court ruled that the fundamental right to court access is a valid justification for Congress' enactment of Title II pursuant to its authority under section 5 of the Fourteenth Amendment.[136]

The Court applied the two-part test adopted in *Kimel v. Florida Bd. of Regents*[137] that requires Congress to unequivocally express its intent to

126. Tennessee v. Lane, 124 S. Ct. 1978 (2004).
127. *Lane*, 124 S. Ct. at 1982.
128. *Id.*
129. *Id.* at 1983.
130. Lane v. Tennessee, 315 F.3d 680, 683 (6th Cir. 2003) [hereinafter *Lane II*].
131. *Lane II*, 315 F.3d at 682.
132. *Id.*
133. *Id.* at 683. The Circuit Court of Appeals indicates the absence of a factual record in the District Court opinion. *Id.*
134. 527 U.S. 356, 364 (2001). *Garrett* raised the question of the constitutionality of Title I of the ADA to the extent that it regulates state governments. *Id.* This ruling relied on a strong interpretation of the 11th Amendment according to Ruth Colker & Adam Milani, Garrett, *Disability and Federalism: A Symposium on* Bd. of Tr. of the Univ. of Ala. v. Garrett: *The Post-*Garrett *World: Insufficient State Protection Against Disability Discrimination*, 53 ALA. L. REV. 1075, 1077-81 (2002).
135. *See* Bazelon Center for Mental Health Press Release, *Supreme Court to Review Americans with Disabilities Act: Ruling Could Shield States from Anti-Discrimination Suits, at* http://www.bazelon.org/newsroom/11-12-03tenn_v_lane.htm (Jan. 15, 2004); *see* Memphis Center for Independent Living Journal, Tennessee v. Lane *Oral Arguments: Why Are the Civil Rights of People with Disabilities a "States Rights" Issue?* (stating comments made by disability rights advocates prior to oral arguments for *Lane*), *at* http://www.mcil.org/mcil/log/2004/011504sa.asp (Jan. 15, 2004) [hereinafter MCIL].
136. *Lane*, 124 S. Ct. at 1994. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. art. XIV, § 5.
137. 528 U.S. 62, 73 (2000).

abrogate state immunity and act pursuant to valid constitutional authority in rejecting the Eleventh Amendment challenge.[138] Title II itself constituted unequivocal intent to abrogate immunity,[139] but the question of valid authority implicated the test in *City of Boerne v. Flores*,[140] which sets out the standard for permissible remedial legislation in these cases. The rule allows remedial legislation so long as it is "congruen[t] and proportional[]" to the threatened injury.[141] Given the history and pattern of discrimination against the disabled and the compelling interest in a fundamental due process right, the Supreme Court upheld Title II with regard to states at least in cases involving access to courts.[142] It is not clear whether Title II is enforceable against states in other settings.[143]

Although *Lane* is primarily an Eleventh Amendment case, it does have broader implications for other categories of ADA litigation. It has sent a signal to the disability rights community that the ADA has not become a dead letter yet.[144] The majority in *Lane* includes those Justices who are typically considered the more liberal members of the Court (Justices Stevens, Souter, Ginsburg and Breyer), along with Justice O'Connor, and seems to represent a shift away from the trend toward narrowing the scope of the ADA, at least with respect to the due process right to court access.[145] However, it is not clear whether this rule will apply to Title II suits under any other circumstances.[146] Such a specific carve-out may not contribute to greater predictability and efficiency in ADA litigation, but it does represent a response to facts that demonstrated an extreme case of the sorts of indignity people with disabilities have been subjected to in this country—with limited or no legal recourse. As the clear deciding vote, Justice O'Connor's position is almost certainly a reaction to this extreme sort of indignity. While not a formalist in the sense of more conservative members of the Court, among her colleagues, Justice O'Connor is among the most consistent supporters of states' rights.[147] Thus, her decision to abrogate Eleventh Amendment immunity in this case indicates a competing, more important value.

Justices Thomas and Kennedy join Chief Justice Rehnquist in his dissent.[148] In it they dispute the majority's conclusions in applying the

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138. *Id.*
139. *Lane*, 124 S. Ct. at 1983.
140. 521 U.S. 507 (1997).
141. *Id.* at 520.
142. *Lane*, 124 S. Ct. at 1993-94.
143. *Id.* at 1992-93.
144. *See* Bazelon Center for Mental Health Press Release, *Supreme Court Decides* Tennessee v. Lane *and* Jones, *Upholds Civil Rights Protections for People with Disabilities, at* http://www.bazelon.org/newsroom/5-17-04lanedecision.htm (May 17, 2004).
145. *See id.*
146. *Lane*, 124 S. Ct. at 1992-93.
147. *See* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 548-49 (1997) [hereinafter Klarman I].
148. *Lane*, 124 S. Ct. at 1997 (Rehnquist, J., dissenting).

Boerne test as reaffirmed in *Garrett*.[149] On the sole basis of formalism, the argument is likely more consistent with Eleventh Amendment jurisprudence than the majority position. Justice Scalia's dissent[150] objects to the "congruence and proportionality test" generally as a "flabby" test.[151] His concerns are characteristically both pragmatic and textual.

E. The Definition of Disability in the ADA

Disability, as with all categories of disadvantage, contains a wide variety of expressions. There is cause, time of onset, expected duration, the severity of impact, the type of impairment and recognizability/unrecognizability.[152] These are all valid categories that help to define with particularity the nature of a given disability. Presumably the spectrum of disadvantage ranges from the involuntary, permanent and severe to the voluntary, temporary and mild. Notably, time of onset and recognizability do not fit neatly within this gradient because they vary depending on the details of a person's experience and are thus more subjective.

Although there may be inconsistency in the way the ADA is applied to different groups, the statute itself does not inquire as to the cause or time of onset of the disability.[153] Severity and type of disability have been used as thresholds for recovery.[154] As mentioned earlier, those with correctable vision problems do not have a claim under the ADA.[155] Although recognizability would play a significant role in determining discrimination cases based on stigma, this factor tends merely to contribute to the threshold analysis in recent cases.[156]

1. Impairment versus Stigma, the Medical versus the Social Model

There are entire classes of people who are stigmatized but do not have a physical or mental impairment. The impairment classification is the product of statistics (a characteristic such as height or weight which is two standard deviations from the mean) or medical pathology.[157] Disabilities related to height and weight are raised in numerous articles critiquing the ADA.[158] For example, a boy who produces normal amounts of growth hormone and is very short, but not so short that he would be considered to have an impairment based on statistics, might suffer the same discrimination as a child with a hormonal deficiency, but it is not

149. *Id.* at 2005-06.
150. *Id.* at 2007 (Scalia, J., dissenting).
151. *Id.* at 2008.
152. *See* Wasserman, *supra* note 86, at 148-52.
153. *See id.* at 147.
154. *Id.* at 147-48.
155. *Sutton*, 527 U.S. at 482-83.
156. *See* Pendo I, *supra* note 31, at 1224-25.
157. Wasserman, *supra* note 86, at 149.
158. *See* Christopher J. Martin, *Protecting Overweight Workers Against Discrimination: Is Disability or Appearance the Real Issue?*, 20 EMPLOYEE REL. L.J. 133 (1994); *see also* Post, *supra* note 39, at 1.

likely that he would be protected under the ADA. This is an area of injustice which intuitively might seem to merit protection under the ADA but does not as it is currently interpreted. This is the situation for many groups who suffer systematic discrimination due to social stigma rather than as a direct cause of impairment.[159]

Although the discussion of stigma raises serious questions of justice, it seems to address the issue of discrimination generally, rather than disability as it is commonly understood. The ADA was never intended to protect all people from all forms of discrimination. Even so, its language and legislative history make it clear that Congress intended to address disability as a social construct—not simply as a medical phenomenon.[160]

2. A Different Standard for States: Eleventh Amendment Immunity

Title II of the ADA expressly prohibits discrimination by state and local governments on the basis of disability with regard to employment, public programs, activities, and services.[161] In *Garrett*, the Supreme Court struck down the provisions of Title I with regard to state governments as a violation of the Eleventh Amendment, a federalism provision granting states immunity to federal claims brought by private parties.[162] This case is consistent with a series of cases decided over the past twelve years that have breathed new life into the Tenth and Eleventh Amendments.[163] This reinvigorated federalism has reasserted the sovereignty of states and has limited previously accepted federal power over certain local issues.[164] It is unlikely that the ADA would have been found unconstitutional on these grounds at the time of its adoption. There is no significant debate that Congress intended for the rights of the disabled to improve access to employment and freedom from discrimination to have greater significance than state interests in discriminating.[165] However, the application of Eleventh Amendment immunity results in the denial of Title I protection for disabled employees of state governments, including instrumentalities of state governments.

A major factor underlying this result is that state discrimination on the basis of disability receives only rational basis review under the Equal

159. Wasserman, *supra* note 86, at 148-50.

160. THE ADA OF 1989 Cal. No. 216: COMM. ON LABOR AND HUMAN RES., S. REP. NO. 101-115, at 15-16 (1989).

161. 42 U.S.C. § 12202 (2004).

162. *Garrett*, 531 U.S. at 363 ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." (quoting U.S. CONST. amend. XI)).

163. Note, *The Irrational Application of Rational Basis:* Kimel, Garrett, *and Congressional Power to Abrogate State Sovereign Immunity*, 114 HARV. L. REV. 2146, 2147 (2001).

164. William Claiborne, *Supreme Court Rulings Fuel Fervor of Federalists*, WASH. POST, June 28, 1999 at A2.

165. *See generally Lane*, 124 S. Ct. at 1978.

Protection Clause of the Fourteenth Amendment;[166] therefore, discrimination is constitutional as long as it is rationally related to a legitimate government purpose.[167] Because such classifications are generally constitutional, and because Congressional action abrogating state immunity under section 5 of the Fourteenth Amendment must be congruent and proportional to a constitutional violation,[168] it is difficult (though as *Lane* demonstrates, not impossible) for Congress to bar state-sanctioned disability-based discrimination. While the ADA claims constitutional authority under the Commerce Clause of the Constitution and the Fifteenth Amendment, the Supreme Court has rejected this claim to the extent that legislation infringes on the legitimate authority of the states unless there has been a clear demonstration of discrimination by states themselves providing a specific due process justification.[169] The Supreme Court has ruled that this is not the case with Title I of the ADA.[170]

Garrett exempts states from suits brought under the employment provisions of Title I, but it does not address the question of liability under Title II. At least one federal circuit court has found that the rule in *Garrett* would apply to Title II claims.[171] While this is reasonable with regard to *Garrett*, a similar Supreme Court ruling applicable to Title II could have completely invalidated the title. Thus with one relatively narrow ruling on the basis of federalism, the Court paved the way for completely gutting Title II. Since the disabled rely heavily on programs, activities, and services largely administered by state governments, striking down Title II would have a profound impact on the disabled by removing the one direct cause of action against states they currently have based on discrimination.[172] Although *Lane* saved Title II from extinction, it only found a constitutional basis for Title II in the very narrow issue of access to courts.

3. The Catch-22 of Employment Cases

For those who are not employed by states or state entities, Title I claims may still be brought; however, these claims have been mostly unsuccessful when litigated.[173] Statistics on cases brought under the ADA are not necessarily indicative of the strength of the Act unless they include data on cases that are settled through administrative channels or

166. Michael H. Gottesman, *Disability, Federalism and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 106 (2001).

167. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 314-15 (1976).

168. *See Flores*, 521 U.S. at 520.

169. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80-83 (2000).

170. *Kimel*, 528 U.S. at 80-83.

171. U.S. v. Morrison, 529 U.S. 598 (2000).

172. National Council on Disability, Policy Briefing Paper: Tennessee v. Lane: *The Legal Issues and the Implications for People with Disabilities*, September 4, 2003 *at* http://www.ncd.gov/newsroom/publications/2003/legalissues.htm (Sept. 4, 2003).

173. *See* SUSAN MEZEY, DISABLING INTERPRETATIONS: THE ADA IN FEDERAL COURTS (forthcoming U. of Pittsburgh Press 2005) [hereinafter MEZEY].

otherwise prior to litigation.[174] That said, Title II cases tend to be more successful than Title I cases when litigated.[175]

The problem that has arisen is that plaintiffs must show actual disability in the form of physical impairment even with correction by medication or device in order to make a claim under Title I, but once they have established that claim, employers are allowed to terminate employees because they do not have the requisite physical ability or qualification.[176] Thus, an employee is forced to "emphasiz[e] all the things he or she cannot do in order to claim ADA protection, and then, once through the courthouse door, [downplay] limitations in order to prove he or she is qualified for the job."[177]

As a practical matter, it would seem that employers will take advantage of this inconsistency whenever possible. Plaintiffs are effectively insulated from this rule only in cases where the claim is based on a clearly identifiable condition traditionally associated with physical, rather than developmental, disabilities such as blindness, hearing impairment, paraplegia, etc. Based on repeated references by the Court to these three categories,[178] it is likely that judges are likely to presume ADA protection for those who have paradigmatic disabilities such as blindness, deafness or paraplegia even if the discrimination suffered is no different than that suffered by those who do not have such impairments.

III. PHILOSOPHICAL PARADIGMS

ADA cases and their complex patchwork of rules are in some measure the result of conflicting philosophical paradigms.[179] Here, philosophy generally means ethics in the broad sense of identifying and making choices that promote "the good."[180] Though similar, it is distinct from morals, which are narrower, more personal, and less concerned with teleology.[181] Undoubtedly, the Court must give a nod to formalism by

174. *See id.*

175. *See id.*

176. *See* Anita Silvers, *The Unprotected: Constructing Disability in the Context of Antidiscrimination Law*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 126, 129 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000).

177. Arlene Mayerson & Matthew Diller, *The Supreme Court's Nearsighted View of the ADA*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 124, 124-25 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000).

178. *Lane*, 124 S. Ct. at 1978 (Scalia, J., dissenting); *Toyota Motor Mfg.*, 534 U.S. at 195; *Sutton*, 527 U.S. at 502.

179. *See generally* Laura F. Rothstein, *Reflections on Disability Discrimination Policy—25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147 (2000); *see generally* Elizabeth A. Pendo, *Substantially Limited Justice?: The Possibilities and Limits of a New Rawlsian Analysis of Disability-Based Discrimination*, 234 ST. JOHN'S L. REV. 225 (2004) [hereinafter Pendo II].

180. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1698 (Merriam-Webster Inc. 1993) (defining "philosophy" as "the study of the principles of human nature and conduct.").

181. *Id.* at 1468 (defining "morals" as "based on inner conviction.").

providing a precedential basis for its decisions. However, after *Bush v. Gore*[182] it is impossible to deny that Supreme Court decisions reflect the underlying values of the individual Justices.[183] While it is simple enough to categorize the basis for decisions as partisan, the ADA cases seem to indicate that competing ethical systems may motivate the decisions of individual Justices differently in different cases. We would expect these sorts of decisions to be more likely in cases on the margins, those with facts that are shocking or unusual. Clearly there is a tension between the judicial impulse to create coherent and consistent rules that are predictable and efficient and the impulse to provide just solutions within the framework of legal tradition.

A. The ADA as an Expression of Rawlsian Justice

The ADA was drafted in the shadow of Title VII and related civil rights legislation and addressed questions of distributive justice that may be understood within the context of the philosophy of John Rawls.[184] The philosophy of John Rawls is most thoroughly described in his *A Theory of Justice*.[185] Rawls posits that justice must fundamentally be fairness.[186] He proposes that rational persons not knowing the circumstances into which they were born would choose a system in which they would be in the best possible position if they were born into disadvantage.[187] That is, if we knew that we might be born into a marginalized group, whether discriminated against on the basis of class, race, ethnicity, gender, religion, orientation or disability, we would choose a system that would provide opportunities comparable to those who were not disadvantaged. The ADA attempts to move closer to such a system in its combination of antidiscrimination and accommodation provisions.

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182. 531 U.S. 98 (2000). For a more detailed discussion of the competing paradigms *see* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1441-1458 (2001).

183. *See generally* Michael J. Klarman, Bush v. Gore *through the Lens of Constitutional History*, 89 CAL. L. REV. 1721 (2001) [hereinafter Klarman II].

184. *See generally* Pendo II, *supra* note 179.

185. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press of Harvard University Press rev. 1999) [hereinafter Rawls I] (It is significant that the ADA received support as an expression of distributive justice in the classical liberal tradition. Rawls posited that fair legal rules can be developed as a social contract negotiated from the "initial position." *Id.* at 10-11. The initial position is a notion similar to the classical "state of nature;" however, it is an artificial position that requires ignoring the actual state of privilege and/or disadvantage into which one is born. *Id.* It assumes that one cannot make a fair decision regarding the distribution of social goods knowing a priori what advantages or disadvantages he or she will actually be born into. *Id.* So, in order to negotiate a fair social contract, we make distributive decisions pretending not to know. *Id.* This is called the "veil of ignorance." *Id.* at 118-23. As opposed to some other theories of social contract, Rawls' veil of ignorance is thick in that it denies knowledge of any details of life such as gender, race, ethnicity, intelligence, health, disability, orientation, etc. *Id.* Presuming human rationality and risk aversion, Rawls assumes that a person in the original position reasoning behind the veil of ignorance will choose to live in the best possible situation if born into disadvantage even if it means sacrificing economic or social privilege if born into advantage.). *Id.*

186. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT xvi (Erin Kelley ed., 2001) [hereinafter Rawls II].

187. *See generally* RAWLS I, *supra* note 185.

While this ethical system is reflected in the Act itself and its implementing regulations, justice as fairness has not been a clear ethical basis for Supreme Court decisions interpreting the ADA, except perhaps in *Abbott* and *Martin*. In both cases, the Court seems to be motivated to provide equal access for those considered disabled by combating irrational discrimination or by providing reasonable accommodations, respectively.[188]

The power of Rawls's theory of justice is most significant with regard to the ADA in creating a consensus regarding policy goals. To that extent, "justice as fairness" analysis ought to be used in any reconsideration of the goals of the ADA.[189] However, it is not as useful in developing rules that efficiently achieve those policy goals. While the ADA should be scrutinized to discover whether it has achieved the goals set out by Congress, failure to achieve those goals efficiently demands reconsidering the legal mechanisms of the ADA—not the goals of the ADA.

B. The Role of Standpoint Theory

Standpoint theory is largely a product of feminist theory, but it has been adapted by a number of marginalized groups, including people with disabilities.[190] The core ethical insights of this philosophy are that the disadvantaged are in the best position to observe and judge the relative justice or injustice of a system.[191] Concomitant to these ideas is the notion that the disadvantaged ought to have a privileged position in modifying systems in order to make them more just.[192] This position is not necessarily in conflict with a Rawlsian view, which requires that rational people at least consider what it would be like to be disadvantaged. The difference is that the Rawlsian social contract is the product of a thought experiment: "What would life be like if I were disabled, poor, etc.?" Within standpoint theory, notions of justice are actually defined by the disadvantaged themselves.

To the extent that the ADA was influenced by the contributions of people with disabilities (such as Senator Robert Dole), it may be considered a product of standpoint theory. Since none of the sitting Justices would likely consider themselves to be disabled, their decisions are unlikely to be the product of standpoint theory from the point of view of the disabled. However, some of the Justices admit a high regard for the view of the disadvantaged even if they are not members of that particular class. This group would likely include Justices Breyer, Ginsburg, Souter,

188. *See Abbott*, 524 U.S. at 637; *Martin*, 532 U.S. at 661-62 (2001).
189. *See infra* Part V for a detailed discussion.
190. Mahowald, *supra* note 17 at 211.
191. *Id.* at 209.
192. *Id.* at 209-10.

and Stevens.[193] Some commentators would also characterize Justice O'Connor as a feminist.[194]

Standpoint theory should be considered in any evaluation or revision of the ADA. Views of the disabled must be considered in the analysis of raw employment data. Empirical studies should be designed to compare experiences of discrimination and well-being since the enactment of the ADA and similar state provisions. Also, in refining our policy approach to the antidiscrimination and participation goals of the ADA, the voices of people with disabilities must be seriously considered. This is also true in a Rawlsian analysis of the ADA.

C. Pragmatism in Narrowing Coverage

All nine members of the Court are driven by pragmatic concerns for judicial consistency and clarity to varying degrees.[195] The fact that important cases limiting ADA protection such as *Williams* were decided unanimously[196] seems to indicate a concern for efficiency over fairness in individual circumstances. From *Sutton* onward, the Court has denied protection to people who might otherwise be considered disabled because it views the class of qualified persons with disabilities as necessarily limited—first, because Congress itself numbered the disabled in the United States at 43 million[197] and second, because the costs would be excessive if ADA protection were given to everyone who wears glasses[198] or has carpal tunnel syndrome.[199] This is a position defended by Justice Scalia as evidenced by his dissent in *Lane* and his position on many other ADA cases.[200]

Of course, the Court must distinguish between disabilities that create major impairments requiring accommodations and those that do not in order to allocate limited economic resources. However, broad application of the antidiscrimination provisions of the ADA does not necessarily

193. These Justices tend to be considered sympathetic to feminist perspectives at least in part because of their ruling on abortion rights cases. *See, e.g.*, Patricia Dreher & Mindy Davis, *After 30 Years of* Roe v. Wade*: We Won't Go Back!*, *at* http://www.now.org/nnt/fall-2002/roe.html (Jan. 22, 2003). "Four justices who can be counted on to vote for reproductive freedom and against most restrictions on abortion: Stephen Breyer, Ruth Bader Ginsberg, David Souter and John Paul Stevens." *Id.*

194. Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 895 (1995).

195. Klarman II, *supra* note 183, at 1723.

196. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 187 (2002).

197. Sutton v. United Airlines, 527 U.S. 471, 484 (1999).

198. *Sutton*, 527 U.S. at 487.

199. *Toyota* 534 U.S. at 199.

200. *See e.g.*, PGA Tour v. Martin, 532 U.S. 6661 (2001); *Lane*, 123 S. Ct. at 3; Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998); Pa. Dep't of Corr. v. Veskey, 524 U.S. 206 (1998); Barnes v. Gorman, 536 U.S. 181 (2002); US Airways, Inc. v. Barnett, 535 U.S. 391 (2002); U.S. v. Morrison, 529 U.S. 598 (2000).

impose additional costs on employers.[201] Pragmatism, including but not limited to neoclassical economics, offers powerful analytical tools for achieving particular goods. However, it is not as helpful in identifying the justice goals of our society.[202]

D. Formalism and States' Rights

Formalism is an awkward basis for judicial decision making. On the one hand, it is the dominant view of the Langdellian revolution in legal education which still dominates American law schools and influences many judges.[203] On the other hand, legal scholars and average citizens find it patently obvious that judges make decisions based on their personal preferences and cloak those decisions with an aura of formalism—particularly on the margins and in difficult cases.[204] That said, those judges typically considered conservative seem to rely more heavily on formalism, as in Rehnquist's dissent in *Lane*.[205] Critical scholars might point out that conservative jurists are more likely to rely on formalism because it reinforces the status quo, even though that status quo may be rife with unfairness.[206]

One result of formalist decisions in ADA cases is the upholding of Eleventh Amendment state immunity. This is particularly noticeable in *Garrett*, but it is also evident in most Title II cases with the notable exception of *Lane*. Although the Court has made it fairly clear that equal protection claims will not abrogate state immunity,[207] perhaps *Lane* will open the door to state liability under Title II for due process claims other than the denial of access to the courts.

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201. While there are persuasive intuitive arguments that the threat of litigation increases firing costs, there is empirical evidence indicating that hiring disabled employees can provide businesses with competitive advantages. Furthermore, accommodations are usually unnecessary and tend to be inexpensive when they are necessary. *See* Peter D. Blanck, *Studying Disability, Employment Policy and the ADA*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 209, 212 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000).

202. Pendo I, *supra* note 31, at 1205-08.

203. *See* Michael Ariens, *Modern Legal Times: Making Professional Legal Culture*, 15 J. OF AM. CULTURE 25, 25-26 (1992).

204. Klarman II, *supra* note 183, at 1734-35.

205. *Lane*, 124 S. Ct. at 1999 (Rehnquist, C.J., dissenting) (arguing that Congress's failure to document state due process violations in the legislative record was a formal reason that the majority opinion in *Lane* was an invalid exercise of Fourteenth Amendment power).

206. Michael Ashley Stein, *Market Failure and ADA Title I*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 193, 196 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) (noting that the status quo is "designed by an empowered majority that has already absorbed existing prejudices and made them endogenous to future decision making").

207. *Lane*, 124 S. Ct. at 1983; *id.* at 1997 (Rehnquist, C.J., dissenting). Chief Justice Rehnquist clarifies that Title II claims based on equal protection grounds would be subject to the same rational base standard applied to Title I claims in Garrett. *Id.* at 2004 (Rehnquist, C.J., dissenting).

E. Virtue Ethics in Reaction to Extremes

Virtue ethics[208] has grown in influence as a reaction to both Kantian deontology and postmodern fragmentation.[209] It is teleological in that it looks toward an ultimate good, which in the case of a legal system would be justice.[210] Virtues[211] can be imitated by individuals and are ultimately reflected within the community.[212] Just individuals contribute to the creation of a just society. While emulable virtues may come from a variety of sources, many virtue ethicists rely heavily on the Nicomachean Ethics of Aristotle, even today.[213] A virtue ethics analysis of disability law is likely to address the facts of legal dispute rather than the rules. If a result does not seem just, however defined, it is not likely to be just. This is a possible explanation for Justice O'Connor's decision in *Lane,* among other controversial decisions. Forcing a man who cannot walk to crawl up two flights of stairs for a court appearance has an air of moral unconscionability. It is the kind of thing that does not occur in a just society, and no amount of formalistic gymnastics can make it just.

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208. Virtue ethics concerns "the virtues themselves, motives and moral character, moral education, moral wisdom or discernment, friendship and family relationships, a deep concept of happiness, the role of the emotions in our moral life and the fundamentally important questions of what sort of person I should be and how we should live." Rosalind Hursthouse, *Virtue Ethics, in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY, *at* http://plato.stanford.edu/archives/fall2003/entries/ethics-virtue/#1 (last mod. Jul. 18, 2003) [hereinafter *Virtue Ethics*].

209. Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 97-99 (2002) [hereinafter Huigens].

> There is a third major tradition in philosophical ethics, rooted in the writings of Aristotle and revived recently under the name of virtue ethics. The philosophical tradition of virtue has nothing to do with the rigid adherence to moral duty advocated by conservatives in our ongoing culture wars. In its proper, technical sense, the word virtue refers to a capacity for sound practical judgment, both on the occasion of action and in the assembly and maintenance of one's system of ends and standing motivations. Virtue ethics as a philosophical enterprise focuses its inquiry on normative governance at the level of motivation—as opposed to duty as dictated by reason, or prescriptions for optimal social welfare.

Id.

210. . ALASDAIR MACINTYRE, AFTER VIRTUE 244, 244-55 (U. of Notre Dame Press, 2d ed. 1984) [hereinafter MACINTYRE I] (discussing how virtues seek to define an "ultimate good," although asserting that individualism can create competing views).

211. *Virtue Ethics*, *supra* note 208.

> A virtue such as honesty or generosity is not just a tendency to do what is honest or generous, nor is it to be helpfully specified as a 'desirable' or 'morally valuable' character trait. It is, indeed a character trait—that is, a disposition which is well entrenched in its possessor, something that, as we say 'goes all the way down', unlike a habit such as being a tea-drinker—but the disposition in question, far from being a single track disposition to do honest actions, or even honest actions for certain reasons, is multi-track. It is concerned with many other actions as well, with emotions and emotional reactions, choices, values, desires, perceptions, attitudes, interests, expectations and sensibilities. To possess a virtue is to be a certain sort of person with a certain complex mindset.

Id.

212. MACINTYRE I, *supra* note 210, at 191-193.

213. *Virtue Ethics*, *supra* note 208. "[A]lmost any modern version [of virtue ethics] still shows that its roots are in ancient Greek philosophy." *Id.*

Alasdair MacIntyre proposes that virtue ethics can define a standard of care for people with disabilities to which we should aspire.[214] He argues that this standard ought to inform our legal rules, including the ADA.[215] Since we all depend upon the care of others, in childhood and old age at the very least, we ought to be able to discern our obligation to care for others.[216] This, MacIntyre understands in the context of human interdependence rather than benevolence owed to the unfortunate by the fortunate.[217] Though the goals may be different, the process of rooting a standard of care in Aristotelian virtues in this case may resemble Rawlsian analysis to the extent that it requires one to be other-directed. Of course, for Rawls this is an act of rational self-interest.

The challenge of legal decisions influenced by virtue ethics is that they could lead to inconsistent or unintelligible doctrines when applied only in cases with outrageous facts. This is a plausible explanation for the patchwork of rules around the ADA, but it might not be the case if virtue ethics were better integrated into judicial decision making. Perhaps the most significant problem with relying on virtue ethics in a pluralistic culture such as the United States is that there is little broad consensus regarding what such virtues as justice actually require.

IV. IDENTIFYING VERSUS ACHIEVING THE GOOD

With the increased use of empirical studies by legal scholars and the growing influence of law and economics on both scholarship and policy, it is not surprising that a number of studies have been conducted to objectively measure the impact of the ADA in the lives of the disabled.[218] Unfortunately, there is serious disagreement about the methodology, usefulness, and conclusions of these studies.[219] It is conceivable that the ADA has created more problems than it has solved; however, even if there is ultimately a consensus that the ADA has failed, an unlikely and highly disputed possibility, the failure of particular policy mechanisms must be distinguished from the goal of achieving social goods (the lowering of irrational discrimination and providing greater opportunities for the disabled).

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214. Alasdair MacIntyre, *The Need for a Standard of Care, in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 81, 81 (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000) [hereinafter MacIntyre II].

215. *Id.* at 82.

216. *Id.* at 83.

217. *Id.* at 84.

218. *See generally infra* notes 220, 221, 226, 227 and 228.

219. Peter Blanck, Lisa Schur, Douglas Kruse, Susan Schwochau & Chen Song, *Calibrating the Impact of the ADA's Employment Provisions*, 14 STAN. L. & POL'Y REV. 267, 289 (2003) [hereinafter Blanck, et. al I].

A. Empirical Analysis

There are now a number of major empirical studies of the ADA's impact on employment. Despite the initial optimism following the passing of the ADA, studies conducted by Thomas DeLier[220] and Daron Acemoglu and Joshua D. Angrist[221] seem to indicate that the ADA actually resulted in a decline of disabled employment. DeLeir used Survey of Income and Program Participation ("SIPP") data for men aged eighteen to sixty-four,[222] and Acemoglu and Angrist used Current Population Survey ("CPS") data for men and women between twenty-one and fifty-eight years of age.[223] DeLeire concludes that the ADA led to a 7.2% decrease in the probability that a disabled man would be employed starting in 1990, with no corresponding increase in wages.[224] Acemoglu and Angrist found similar drops in employment probability, but not until 1992.[225] The discrepancy in findings raises questions regarding both methodology and reliability.

Contrary results were reached by John Bound and Timothy Waidmann[226] and by Douglas Kruse and Lisa Schur.[227] Looking at the same SIPP and CPS data, these scholars attribute the decline in employment probability to changes in federal disability benefits and health status.[228] Christine Jolls argues that the decline may be accounted for by demonstrated increases in the rate of disabled adults seeking education and employment training, presumably with the intention of obtaining new or better employment.[229] Thus, the drop in the early 1990's was actually a positive response to the ADA to the extent that those with disabilities suddenly expected a greater return on investment in human capital.[230]

There are still a number of problems with these studies. The most important methodological issue is that the data relied on does not use the narrow definition for "disabled" from ADA jurisprudence.[231] Further-

220. Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 694 (2000) [hereinafter DeLeire].

221. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON 915, 917 (2001) [hereinafter Acemoglu & Angrist].

222. DeLeire, *supra* note 220, at 698.

223. Acemoglu & Angrist, *supra* note 221, at 917.

224. Deleire, *supra* note 220, at 705.

225. Acemoglu & Angrist, *supra* note 221, at 929.

226. JOHN BOUND & TIMOTHY WAIDMANN, ACCOUNTING FOR RECENT DECLINES IN EMPLOYMENT RATES AMONG THE WORKING-AGED DISABLED (Nat'l Bureau of Econ. Research, Working Paper No. 7975, 2000).

227. Douglas Kruse & Lisa Schur, *Employment of People with Disabilities Following the ADA*, 42 INDUS. REL. 31-66 (2003) [hereinafter Kruse & Schur].

228. CHRISTINE JOLLS, IDENTIFYING THE EFFECTS OF THE AMERICANS WITH DISABILITIES ACT USING STATE-LAW VARIATION: PRELIMINARY EVIDENCE ON EDUCATIONAL PARTICIPATION EFFECTS 1 (Am. Law and Econ. Assoc. Ann. Meeting, Working Paper 62, 2004), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=1078&context=alea [hereinafter JOLLS I].

229. *Id.*

230. *Id.* at 9.

231. Kruse & Schur, *supra* note 227, at 40-45.

more, even discounting other external factors, the ADA would have relatively little impact on employment levels in states that had comparable protections in place before the passage of the ADA.[232]

As a partial response to this problem, this paper proposes a new empirical project to obtain data from those who would clearly qualify as disabled under the ADA, particularly in states which had no comparable state antidiscrimination statute before 1990. Ideally the target group would consist of people who are unable to see, hear or walk, with a likely presumption of disability under the ADA, from Arkansas, Mississippi and Alabama (the states without prior protections),[233] and between the ages of thirty-four and sixty (those who would have been of working age at least two years prior to the passage of the ADA).

B. Discrimination and Accommodation

The employment provisions of the ADA serve both as antidiscrimination and accommodation measures.[234] Civil rights legislation designed to combat the effects of irrational discrimination also provided a cause of action for discriminatory hiring and firing practices as well as granting hiring preferences.[235] Given perfect markets, it is true that irrational discrimination ought to disappear because it is not efficient.[236] However, there remains clear evidence of irrational discrimination against people with disabilities in the labor market.[237] So, the ADA and related legislation effectively provides incentives for employers to overcome discrimination. These are primarily negative incentives in the form of mandatory regulatory compliance and the threat of litigation. Accommodation, however, is a cost borne at least initially by employers, intended to enable people with disabilities to compete in terms of worker efficiency. Ideally, with reasonable accommodations, qualified people with disabilities can compete with non-disabled employees, dispelling assumptions that might perpetuate irrational discrimination. However, placing the cost burden on employers could have the unwanted consequence of encouraging discrimination.

Christine Jolls argues that antidiscrimination and accommodation measures in the ADA actually serve overlapping and complementary roles.[238] Legislation intended to lower taste-based discrimination[239] and

232. JOLLS I, *supra* note 228, at 2.

233. *Id.* at 11.

234. *See* Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L.REV. 642, 645 (2001) [hereinafter Jolls II].

235. *Id.* at 697-98.

236. Gary Becker, THE ECONOMICS OF DISCRIMINATION 39-40 (Univ. Chicago Press, 2d ed. 1971) [hereinafter Becker].

237. Marjorie Baldwin & William Johnson, *Labor Market Discrimination against Men with Disabilities*, 29 J. HUM. RESOURCES 1, 1-19 (1994).

238. Jolls II, *supra* note 234, at 698.

> [C]ertain aspects of antidiscrimination law—in particular its disparate impact branch—are in fact accommodation requirements. In such instances it is hard to resist the conclu-

to provide fair opportunities to a historically disadvantaged class must address the deeper causes of selective unemployment such as the lack of education and job training.[240] Ultimately, reasonable accommodation has been required because it is essential if we are to achieve the goal of equal participation in society by people with disabilities, in the tradition of the Rawlsian ideal. Although the cost of reasonable accommodations may limit the number of people who might otherwise benefit from the antidiscrimination protection of Title I, accommodations are an essential element in overcoming irrational discrimination.[241]

C. Incentives

Historically, the greatest negative incentives in the employment of the disabled are discrimination and the lack of reasonable accommodations. There is insufficient incentive to invest in human capital through education or vocational training if there is no hope for a reasonable return, particularly if accepting employment requires sacrificing disability assistance.[242] In response, the ADA creates an accommodation requirement and a cause of action against discriminating employers as negative incentives to discourage discrimination.[243] Although the antidiscrimination portion of this policy may be helpful, the accommodation provision diverts employer resources that could be used to hire qualified people with disabilities who require little or no accommodation.[244] Employer costs increase, and the ADA is to blame.

Thus, it is imperative that positive incentives remove some of the cost burden from employers. The clearest incentives are tax deductions for the cost of accommodations.[245] To the extent that these are one-time sunk costs, employers who have made accommodations would have access to a broader labor market, including people with disabilities for which they have already accommodated, making these employers more competitive. Technological improvements make it more likely that ac-

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sion that antidiscrimination and accommodation are overlapping rather than fundamentally distinct categories, despite the frequent claims of commentators to the contrary. The overlap between the two categories, I suggest, also sheds light on the question of Congress's power under Section 5 of the Fourteenth Amendment to enact laws (such as the FMLA) that expressly mandate the provision of particular employment benefits directed toward specific groups of employees.

Id.

239. The economic dynamic of irrational discrimination, a "taste for discrimination," was described by Gary Becker in *The Economics of Discrimination*. Becker, *supra* note 236, at 39-40.

240. *See* JOLLS I, *supra* note 228, at 1.

241. Jolls II, *supra* note 234, at 698.

242. Peter Blanck, et al., *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583, 1639-40 (2000) [hereinafter Blanck, et al. II].

243. 42 U.S.C. § 12101(b) (2004).

244. Acemoglu & Angrist, *supra* note 221, at 920-23.

245. 26 U.S.C.A. § 190 (2004).

commodations will be scalable within a business.[246] On the employee side, positive incentives, including access to education and job training, are crucial, especially for those who did not invest in human capital before the ADA.[247]

D. The Need for Meaningful Data

Congress has made the goal of combating discrimination and providing meaningful opportunities for the disabled to participate in the labor market and society a national goal.[248] This is an acknowledged good that legislation such as the ADA is intended to achieve. However, there is no point in enforcing rules that do not further this goal. Detailed studies on the impact of legal incentives on the employment opportunities of people with disabilities are critical for modifying current legal rules or proposing new ones. It is encouraging that a body of literature has developed in the last four years that takes these issues seriously. However, if antidiscrimination and inclusion are still national goals, we must consider broadening the protections of the ADA to the extent originally expressed by Congress. Further studies will help provide a more rational basis for changes in disability law.

V. BROADENING THE SCOPE OF THE ADA

The enactment of the ADA represented an ethical decision on the part of Congress to provide greater access, opportunity, and protection to people with disabilities. The language of the ADA itself makes the elimination of discrimination a clear national mandate.[249] To the extent that courts, including the Supreme Court, have limited the application of the ADA and frustrated this goal, Congress ought to amend the ADA to create clearer and more efficient rules for countering discrimination against the disabled. Since discrimination as defined by the Act is rooted in the social response to the disabled rather than the physical impairment itself, ADA rules ought to more clearly address the stigma associated with disability in attempting to reduce irrational discrimination. Any proposed changes ought to address distributive justice concerns, the

246. Heidi M. Berven and Peter David Blanck, *The Economics of the ADA Part II- Patents and Innovations in Assistive Technology*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 85-89, 96 (1998).

247. Blanck, et al. II, *supra* note 242, at 286.

248. Tennessee v. Lane, 124 S. Ct. 1978, 1984 (2004).

249. 42 U.S.C. § 12101(b) (2004).

> It is the purpose of this chapter—(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Id.

ramifications of increased litigation, state immunity problems and the catch-22 created by *Sutton*.

A. Legislation Defining Disability as Stigma

In order to be relevant and effective, the ADA requires significant changes, drafted within the context of disability law, but which would unequivocally apply to anyone discriminated against on the basis of social stigma associated with disability. Such legislation should require courts to consider the social model originally intended by Congress.[250] Philosophically, this position emphasizes broader protections from discrimination based on differences that are consistent with a Rawlsian point of view.

Congress needs to make it clearer that those covered by sections 3(2)(B) and (C) of the current ADA, people with a history of a disability or perceived as having a disability,[251] are intended beneficiaries of this legislation. There should be clear examples of the kinds of people who should be protected from discrimination listed in the Congressional Record—even if their conditions do not constitute a physical impairment according to the medical model or if their conditions are managed with drugs such as for epileptics or diabetics. To be absolutely clear, the proposed changes would create a new category consisting of those who are discriminated against due to the stigma of actual, historic, or perceived disability. It is unfortunate that judicial activism has circumvented legislative intent to the extent that the plain meaning of a statute is simply reconstrued,[252] but it requires that Congress express its intentions with greater precision. Since any piece of legislation consists of a bundle of compromises, this kind of clarity can be difficult to achieve, but the alternative is to cede legislative authority to the courts, which seems to have happened in ADA cases.

B. Distributive Implications

Broadening the protections of the ADA, or disability legislation in general, might adversely impact the severely disabled who are among the powerless described by Justice Ginsburg. With regard to accommodation, the ADA is an unfunded mandate (with the exception of subsidies in the form of tax credits) and institutions need only make reasonable accommodations. Thus, if more employees of a company could make claims for accommodation, the pool available for the severely disabled as currently understood would be reduced. It might be argued that that distribution could be prioritized. However, such an arrangement would require a bright line test, could default to the current standard of impair-

250. This is true at the very least in the case of 42 U.S.C.A. § 12102(2)(C) of the ADA which does not require actual impairment.

251. 42 U.S.C.A. § 12102(2)(B) (2004).

252. Center & Imparato, *supra* note 13, at 322.

ment, and would leave few, if any, resources for the newly covered. The argument that there are limited resources is reinforced by the fact that even now most challenged claims are denied.[253]

While these objections have validity with regard to the provisions that require access to special services or require employers to make expensive accommodations, it would be possible and appropriate to limit the scope of the ADA to preventing discrimination for those who make claims based on stigma alone rather than actual impairment. After all, if there is no actual impairment, there should be no need for accommodation. All of the arguments raised rely on the assumption that those protected by antidiscrimination provisions require accommodations. If we do not grant accommodation to those claiming discrimination due to stigma alone, there will be no accommodation costs. As with the Civil Rights Act, aggressive distributive justice measures like affirmative action and accommodations can be handled separately from the core antidiscrimination provisions even though they serve overlapping functions.

C. Litigation

Drafting statutes requires line-drawing, and it is commonly understood by legislators that bright line standards are most efficient. They are admittedly arbitrary, but they establish that certain categories of people are not intended to be covered. The medical standard typically used in ADA litigation may appear to be more objective, but it is subjective in that it requires a physician's opinion. There is significant evidence to indicate that medical diagnosis fails as a truly objective standard in litigation.[254] Ultimately, proving stigma may be no more subjective than proving impairment.

It may be argued that a standard of individual impact due to stigma would open the courthouse doors to mountains of potential claims by "short, fat, homely people,"[255] and that without clear standards, litigation would become more time consuming and more expensive. There is probably some truth to this claim. If we expand the protection of the ADA, there will likely be more litigation. However, it must be noted that Congress intended to cover those who are perceived to be disabled in the original ADA, so technically such claims were litigable before. Furthermore, if preventing injurious, unjustified discrimination is a goal of our justice system, then litigation is an inevitable consequence of legislation that would further that goal as in the Civil Rights Act.

253. MEZEY, *supra* note 173.
254. SUSAN WENDELL, THE REJECTED BODY 117-138 (NY: Routledge 1996).
255. Wasserman, *supra* note 86, at 154.

D. How to Overcome the Federalism Problem

The issue of federalism is the most problematic for the ADA, as the response to *Lane* in both the majority and the dissents may indicate.[256] If the Supreme Court has determined that Congress has no legal authority to enact such legislation, then amendments will inevitably fail.

First, the legislative history and preamble to any new legislation should more clearly document historical patterns of discrimination against the disabled in both the private and public sectors. If a clear pattern of discrimination is shown, the Court might be more willing to uphold restrictions on states as employers under equal protection and due process rights other than access to courts.

Second, Congress could define qualified disabled persons as members of a class requiring stronger protection under the Fourteenth Amendment. As long as states can discriminate based on any "rational basis," the current standard, there will be relatively little protection for the disabled. While Congress may not have the power to designate a suspect class for purposes of constitutional jurisprudence, the Court is beginning to analyze discrimination cases on a more individualized basis, recommending proportional responses.[257] This is particularly true in light of *Lawrence v. Texas*.[258] If Congress were to clearly identify patterns of discrimination that justify a stronger federal response, the courts would be under more pressure to enforce the legislation as written, even if a new suspect class were not created for Fourteenth Amendment purposes.

E. Solving the Catch-22

Here, distinguishing between stigma, with or without actual impairment, and impairment alone is significant. With regard to discrimination, the key issue is stigma. The Supreme Court may have been reasonable in concluding that those who have relatively minor correctable vision problems are not "disabled" in the sense intended by the ADA. Actual impairment still raises valid issues of accommodation and access,

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256. MCIL, *supra* note 135.

> This case is important not just because it threatens to gut the ADA, preventing millions of people with disabilities from enforcing their rights, but also because it is the latest attack in an aggressive campaign by extremist conservatives in recent years to weaken federal civil rights protections for all Americans, under the notion of states' rights," said Nancy Zirkin, deputy director and director of public policy at the Leadership Conference on Civil Rights, a leading national civil rights coalition.

Id.

257. *See generally* Lawrence v. Texas, 539 U.S. 558, 560 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003).

258. Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny*, 6 U. PA. J. CONST. L. 945, 996 (2004). The Court in *Lawrence* overturned the state power to criminalize sodomy established in *Bowers v. Hardwick*, 478 U.S. 186 (1986) on due process grounds. While the standard used by the Court does not resemble intermediate or strict scrutiny, neither does it appear to be a simple rational basis standard. *See* Lawrence v. Texas, 539 U.S. 558, 571-579 (2003).

and those cases could be litigated under different auspices than pure discrimination claims. If someone with hypertension or diabetes is stigmatized in some way, then they should receive protection from discrimination based on that stigma whether the condition is corrected by medication or not. If an employer makes irrational decisions based on prejudices regarding a person's health and perceived disability, there should be a remedy under the ADA as originally drafted. The fact that a condition is correctable by prosthesis, device or medication does nothing to eliminate the irrational bias and discrimination. Separating distributive justice measures linked with impairment and antidiscrimination concerns associated with stigma would eliminate the catch-22 in those cases in which it seems most illogical.

VI. CONCLUSION

Our comprehensive approach to disability must distinguish between cases that address functional issues of access based on impairment and discrimination issues based on stigma. This would return us to the social model apparently intended by Congress, at least with regard to discrimination cases, and would mitigate the catch-22 problem.[259]

New legislation must be clearly drafted to unequivocally and strategically define the categories of those who should be protected under the ADA as well as demonstrate a clear history of discrimination against the disabled. Legislation must aggressively address the challenges to Congressional authority posed by recent Supreme Court cases within the framework of those decisions in the context of federalism.

The ADA was intended to promote justice for the disabled. It has become a model for many nations.[260] Unfortunately, the reach of the ADA has been gradually eroded by court decisions. Perhaps without even intending it, the Supreme Court has created a legal framework that is filled with contradictions and denies justice to the intended beneficiaries of the legislation. If the ADA is not amended, its effectiveness as an antidiscrimination law will likely continue to diminish, even if cases such as *Lane* occasionally enforce its provisions in narrow circumstances.

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259. Pendo I, *supra* note 31 at 1226.

260. Jerome E. Bickenbach, *The ADA v. the Canadian Charter of Rights: Disability Rights and the Social Model of Disability*, *in* THE AMERICANS WITH DISABILITIES ACT: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 354 (Notes) (Leslie Pickering Francis & Anita Silvers eds., Routledge 2000). A number of nations have enacted legislation modeled on the ADA, including Australia (Disability Discrimination Act, 1992), the United Kingdom (Disability Discrimination Act, 1995, c 50), New Zealand (Human Rights Act, 1993, No. 82), India (Disabled Persons Act), and Israel (Disabled Persons Act, 1998). *Id.*

A ROSE BY ANY OTHER NAME: SCHOOL PRAYER REDEFINED AS A MOMENT OF SILENCE IS STILL UNCONSTITUTIONAL

LEE ANN RABE†

I. INTRODUCTION

Views on prayer in public schools have been sharply divided ever since the Supreme Court affirmed the separation of church and state in that setting.[1] Various political interest groups have repeatedly attempted to "return God to the classroom" by introducing legislation aimed at restoring prayer to public schools.[2] Since the terrorist attacks of September 11th, 2001, there is a renewed interest in school prayer.[3] Many state governments are considering passing legislation mandating a "moment of silence" or otherwise promoting prayer in public schools.[4] The issue of

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1. Engel v. Vitale, 370 U.S. 421, 435 (1962). Justice Black, writing for the majority, held that use of a brief, non-denominational prayer each morning in the New York public schools was a clear violation of the Establishment Clause of the First Amendment. *Id.* at 424. The majority opinion reminded us that freedom from government-imposed religion was one of the reasons colonists had come to America in the first place. *Id.* at 425. The Court noted that the First Amendment was adopted as a safeguard, "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say . . . ." *Id.* at 429.

The following year, the Court also prohibited Bible readings in public schools. Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963). The Court noted that the First Amendment was written to ensure "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 217 (citing Everson v. Bd. of Educ., 330 U.S. 1, 31-32 (1947)).

2. *See infra* Part IV (A).

3. *See, e.g.*, Jodie Morse, *Letting God Back In; Prayer, Long Banned from Schools, Is Making a Post-terror Comeback*, TIME, Oct. 22, 2001, at 71 (noting that "[s]ome teachers are broadcasting morning blessings over the p.a. system or praying with distraught students."); Howard Fineman: *One Nation, Under . . . Who?*, NEWSWEEK, July 8, 2002, at 20 (noting the resurgence of religious speech by political leaders since the attacks).

4. Examples of this legislation include (but are not limited to): the Religious Speech Amendment, H.R.J. Res. 81, 107th Cong. (2001) (introduced in December 2001 by U.S. Rep. Ernest Istook); H.R. 1142, 146th Gen. Assem., Reg. Sess. (Ga. 2002); Idaho H.J.M. 17; H.C.R. 5050, 79th Gen. Assem., Reg. Sess. (Kan. 2002); H.C.R. 19, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002); H.J.R. 635, 102d Gen. Assem. (Tenn. 2002); H.J.R. 682, 102d Gen. Assem. (Tenn. 2002) (all calling on Congress to pass a constitutional amendment allowing voluntary school prayer); H.C.R. 22, 91st Gen. Assem., 2d Reg. Sess. (Mo. 2002) (calling for federal legislation allowing voluntary school prayer); Missouri H.C.R. 30 (proposing a constitutional amendment allowing voluntary school prayer); H.B. 1446, 157th Gen. Ct., 2d Reg. Sess. (N.H. 2001) (requiring students to recite the Lord's Prayer at the beginning of each day); H.B. 676, 185th Gen. Assem., Reg. Sess. (Pa. 2001)

prayer in public schools has also re-emerged in the federal court system, in the guise of objections to the words "under God" in the Pledge of Allegiance.[5] Also, at least one candidate for state governor wants to make returning prayer to public schools a major plank in his campaign.[6] In *Wallace v. Jaffree*,[7] the Court held that laws creating a moment of silence are unconstitutional if the purpose is to promote religion; however, the Court seemed to leave open the possibility that moment of silence laws, enacted without such motivations, might be constitutional.

For a movement that has been seeking to reintroduce prayer in schools for more than 40 years, the potential loophole left open by the Court in *Jaffree* appears to be a golden opportunity when combined with increased popular support for prayer in general following the September 11th attacks.[8] How much of an opportunity actually exists depends on the exact parameters of the Court's view on moment of silence laws. Since *Jaffree*, however, the Court has declined to clarify its position by taking another case on these laws.[9] Given the Court's silence, interested parties can only attempt to infer the direction of the Court from other sources including the Court's recent related Establishment Clause jurisprudence. The recent case *Doe v. School Board of Ouachita Parish*[10] in Louisiana illustrates the connection between moment of silence laws and school prayer, and also serves as another guidepost in the murky landscape left by the Supreme Court.

This Article explores the possible direction of the Court in this area. Part II analyzes *Wallace v. Jaffree*, the seminal Supreme Court case striking down legislation requiring religiously motivated moments of silence in schools. Part III examines some of the state challenges to moment of silence laws since *Jaffree* and the rationales courts have used

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(requiring the Department of Education to request all school districts to begin each school day with prayer or a short period of meditation); H.B. 541, Biennium Adj. Sess. (Vt. 2002) (requiring schools to begin each day with a short prayer).

5. *See* Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002) (discussed more fully *infra* note 132 and accompanying text).

6. Governor Rick Perry, re-elected in 2002 to a full four-year term as Texas governor, supports a return to public school prayer, at least partially in response to the terrorist attacks. He sees "no problem with ignoring the U.S. Supreme Court ban on organized school prayer 'at this very crisis moment in our history.'" Meighan, Editorial, *Perry's Stand on Prayer Sends a Bad Message*, CORPUS CHRISTI CALLER-TIMES, Nov. 3, 2001, at A15. Senator David Scott (D-Ga.) was elected in 2002 to represent Georgia's 13th Congressional District. Scott campaigned on the issue of restoring prayer to public schools through legislation making the requirement of a moment of silence legal. *Ready to Represent Georgia*, JET, Sept. 16, 2002, at 34.

7. 472 U.S. 38 (1985).

8. *See infra* Part IV for a more detailed explanation of the road from school prayer to moment of silence statutes.

9. Most recently, the Court denied certiorari to a case challenging the Virginia moment of silence statute, Brown v. Gilmore, 258 F.3d 265, 270 (4th Cir. 2001) (affirming holding that the statute did not unconstitutionally establish religion), *cert. denied*, 534 U.S. 996 (2001).

10. 274 F.3d 289 (5th Cir. 2001) (striking down a Louisiana statute validating vocal prayer in public schools, which had formerly contained the word "silent," but was recently modified to allow vocal prayer).

for sustaining or striking down these statutes.[11] Finally, Part IV outlines why public school moment of silence statutes, as stand-ins for school prayer, must be unconstitutional as a violation of the Establishment Clause.

II. THE COURT SPEAKS: *WALLACE V. JAFFREE*[12]

The Supreme Court's first, and only, statement about moment of silence laws came in 1985. *Wallace v. Jaffree*[13] settled a challenge to a 1981 Alabama statute[14] authorizing a one-minute period of silence in public schools "for meditation or voluntary prayer."[15] The plaintiff, Ishmael Jaffree, on behalf of his school-age children, sought an injunction against the application of this statute, claiming it violated the First and Fourteenth Amendments.[16] The defendants argued that the First Amendment, and therefore the Establishment Clause, did not apply to the states but only to the federal government.[17] Further, the State argued that the Fourteenth Amendment did not and was never intended to subject the states to the restrictions of the First Amendment.[18]

After a lengthy trial, with testimony from state officials including the primary sponsor of the amendment, State Senator Donald G. Holmes,[19] the District Court reviewed the history of the First and Four-

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11. Four state "moment of silence laws" have been challenged since *Jaffree*. Two were upheld—*Bown v. Gwinnett Sch. Dist.*, 112 F.3d 1464 (11th Cir. 1997), and *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001)—and two were struck down as unconstitutional—*May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985), and *Doe v. Ouachita Sch. Bd.*, 274 F.3d 289 (5th Cir. 2001).

12. 472 U.S. 38 (1985).

13. *Jaffree*, 472 U.S. at 38.

14. ALA. CODE § 16-1-20.1 (Supp. 1984).

> At the commencement of the first class of each day [in all grades] in all public schools the teacher in charge of the room in which each such class is held may announce that a period of silence, not to exceed one minute in duration, shall be observed for mediation, and during any such period of silence shall be maintained and no other activities shall be engaged in.

Id. Two other statutes—ALA. CODE §§ 16-1-20 & 20.2 (Supp. 1984) were also challenged in the original complaint. *Jaffree*, 472 U.S. at 41-42. The plaintiffs dropped their claim that section 16-1-20, which provided for a period of silence for meditation, was unconstitutional. *Id.* Section 16-1-20.2, which provided for teacher-led prayers at the start of the school day, was held to be unconstitutional by both the Court of Appeals for the Eleventh Circuit and by the Supreme Court, and was not at issue in *Jaffree*. *Jaffree*, 472 U.S. at 41-42.

15. ALA. CODE § 16-1-20.1 (Supp. 1984). The 1984 amendment actually added the words "voluntary prayer" to the statute, which had previously only called for a moment of silence for meditation.

16. *Jaffree*, 472 U.S. at 42-43 (stating that the original complaint simply asked that the school be enjoined from imposing religious services and prayers on the public school students, while a later amendment to the complaint specified the portions of the Alabama Code at issue).

17. Jaffree v. Bd. of Sch. Comm'rs, 554 F. Supp. 1104, 1113 (S.D. Ala. 1983).

18. *Id.* The defendants also argued that if religion were to be banned from public schools, so-called "secular humanism" would also need to be removed from the curriculum. *Id.* Since "[s]uch a purge" would be difficult if not impossible, the defendants argued that other religions must also be permitted to remain. *Id.*

19. *Jaffree*, 472 U.S. at 43. Senator Holmes testified that he had no secular purpose in mind when he introduced the amendment adding "voluntary prayer" to the Alabama statute in question.

teenth Amendments.[20] The District Court held that the Establishment Clause does not prevent states from establishing a religion and upheld the moment of silence law.[21] The Eleventh Circuit Court of Appeals reversed the District Court.[22] The Supreme Court affirmed, holding that the First Amendment did apply to the states as well as to the federal government and that the law was unconstitutional as a violation of the Establishment Clause.[23]

Writing for a five-Justice majority, Justice Stevens affirmed the holding below that the Establishment Clause of the First Amendment, through the Fourteenth Amendment, applied to the states, as well as to the federal government.[24] He stressed the central importance of the idea that individuals must be free not only to worship as they choose, but also to refrain from worshipping at all, if they so choose.[25] Governments, both state and federal, must respect this "basic truth"—that individuals cannot be forced by the State to either abandon or embrace religion.[26]

Justice Stevens applied the *Lemon* test, formulated to evaluate Establishment Clause challenges, to the Alabama law.[27] This test consists

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Id. His sole intention was an "effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction." *Id.*

20. *Jaffree*, 554 F. Supp. at 1113, 1125 (concluding that the purpose of the First Amendment was to ensure that the federal government would not interfere with the states' right to establish official religions, and that the Fourteenth Amendment was never intended to apply the First Amendment to the states).

21. *Id.* at 1128 (acknowledging that its decision was against the force of Supreme Court precedent, but felt that the previous decisions were wrongly made and felt "a stronger tug from the Constitution which it ha[d] sworn to support and to defend" than from adherence to precedent). *Id.* at 1126-28.

22. Jaffree v. Wallace, 705 F.2d 1526 (1983). The court of appeals chastised the district court for acting against Supreme Court precedent, emphasizing the doctrine that lower courts are bound by the decisions of higher courts:

> The district court attempted to justify its actions by discussing the limited exceptions to the doctrine of stare decisis. The doctrine of stare decisis pertains to the deference a court may give to its *own* prior decisions. The stare decisis doctrine and its exceptions do not apply where a lower court is compelled to apply the precedent of a higher court.

Id. at 1532 (citations omitted) (emphasis added). The court of appeals also noted that the Supreme Court had rejected the narrower interpretation of the Establishment Clause that the district court clung to. *Id.* at 1530. It also noted the Court's unanimity "regarding the history of the first amendment's applicability to the states through the fourteenth amendment." *Id.* at 1531.

23. *Jaffree*, 472 U.S. at 61.

24. *Id.* at 48-49. The Supreme Court unanimously affirmed the portion of the appellate decision that overturned the district court's holding that the First Amendment did not restrict the states. *Id.* Stevens briefly elaborated on this affirmation, citing a long string of Supreme Court cases that have held the First Amendment applicable to the states as well as to the federal government. *Id.*

25. *Id.* at 53 (stating that "[this] Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all.").

26. *Id.* at 55 (quoting Justice Jackson, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

27. *Id.* at 55 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)). The Establishment Clause test first articulated in *Lemon* has been modified slightly by later cases, including *Agostini v. Felton*, 521 U.S. 203 (1997) (modifying the criteria used to assess whether aid to religion has an impermissible effect).

of three prongs: first, that there is a secular purpose for the law; second, that the primary effect of the law must not be to advance or inhibit religion; and third, that the law not cause excessive entanglement between the government and religion.[28] Justice Stevens only examined the first prong of the three-prong test, however, as the Court found that the Alabama law had no secular purpose.[29] Both the text of the statute[30] and statements by State Senator Donald G. Holmes, the bill's sponsor,[31] indicated that the statute had a purely religious purpose—returning prayer to public schools. For the majority of the Court, the fact that the statute clearly and solely had a religious purpose eliminated the need to examine the second and third prongs of the *Lemon* test.[32] Thus, the Court struck down the Alabama statute as a violation of the First Amendment.[33]

In reaching this conclusion, the majority also noted the importance of the special setting involved—the public schools. Justice Stevens stated that the "indirect coercive pressure upon religious minorities to conform" is of special concern in the public school setting.[34] He expanded on the special significance of the public school setting by citing several previous cases where the Court acknowledged the role peer pressure plays in school settings.[35] Justice Stevens especially worried about the potential impact of peer pressure, citing Justice Frankfurter's earlier concerns, "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children."[36]

Both Justice O'Connor and Justice Powell concurred in the majority decision, but separately maintained that some moment of silence laws might well be constitutional.[37] Justice O'Connor explained that moment

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28. *Id.* at 55-56 (citing *Lemon*, 403 U.S. at 612-13). The *Lemon* test is discussed in more detail *infra* in Part IV.

29. *Id.* at 56.

30. *Id.* at 60 (finding the text of the Alabama statute problematic because it calls for "voluntary prayer" from the students and that the addition of the word "prayer" to the statute was seen as an attempt by the legislature to promote "prayer as a favored practice").

31. *Id.* at 43 (quoting Senator Holmes' explanation "that the bill was an 'effort to return voluntary prayer to our public schools . . . it is a beginning and a step in the right direction'"). Senator Holmes also made it clear that he "had no other purpose in mind," other than restoring prayer to public schools. *Id.* at 57.

32. *Id.* at 56 (stating that this factor was dispositive).

33. *Id.* at 61.

34. *Id.* at 61 n.51 (citing *Engel*, 370 U.S. at 430).

35. *Id.* (citing Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 227) (1948) (Frankfurter, J., concurring) (noting that when governmental support is given to a specific religious belief, there is pressure put on religious minorities to conform); *Schempp*, 374 U.S. at 290 (voicing concern that students might participate in religious activities to avoid being stigmatized); Marsh v. Chambers, 463 U.S. 783, 792 (1983) (distinguishing between adults not being very susceptible to 'religious indoctrination' and children who are subject to peer pressure).

36. *Id.* at 61 (quoting *McCollum*, 333 U.S. at 227) (Frankfurter, J., concurring).

37. *Id.* at 62, 72 (Powell, J., concurring) (O'Connor, J., concurring).

of silence laws were not inherently unconstitutional: first, they are not "inherently religious;"[38] second, a moment of silence does not coerce a student into "compromis[ing] his or her beliefs."[39] The primary concern according to O'Connor was whether the state "has conveyed or attempted to convey the message that children should use the moment of silence for prayer."[40] To determine if the state has done this, Justice O'Connor would look to the circumstances surrounding the enactment of the moment of silence law, specifically, "the history, language, and administration of a particular statute."[41] Justice Powell largely agreed with Justice O'Connor, and would also find a moment of silence law constitutional if there was a clear secular purpose for the law.[42]

While the Court's decision in *Jaffree* settled the question of Alabama's statute, the more general question of moment of silence statutes was left at least partially open. Since 1985, the Court has refused to definitively answer that question, denying certiorari in moment of silence cases. Part III of this Article examines the four appellate moment of silence decisions since *Jaffree*; two circuit courts have upheld such statutes, and two have invalidated them. Part IV considers the potential unconstitutionality of all moment of silence laws, attempting to read between the lines and determine the future of the Court's Establishment Clause jurisprudence.

III. INTO THE FUTURE: STATE CHALLENGES SINCE *JAFFREE*

The overall picture of the constitutionality of moment of silence laws remains murky. Since *Jaffree* was decided in 1985, only a few states have had constitutional challenges to their own moment of silence laws. Two of these states upheld the moment of silence laws as constitutional,[43] and two struck down the law as unconstitutional.[44] Because the Supreme Court has yet to take a moment of silence case since *Jaffree*, these lower court rationales serve as the only guideposts for the constitutionality, or lack thereof, of such laws.

38. *Id.* at 72.
39. *Id.*
40. *Id.* at 73.
41. *Id.* at 74.
42. *Id.* at 66.
43. The statutes of both Georgia (1997) and Virginia (2001) were upheld by the circuit courts. Bown v. Gwinnett County Sch. Bd., 112 F.3d 1464, 1474 (11th Cir. 1997); Brown v. Gilmore, 258 F.3d 265, 282 (4th Cir. 2001), *cert. denied*, 534 U.S. 996 (2001).
44. The statutes of both New Jersey (1985) and Louisiana (2001) were struck down by the circuit courts for violating the Establishment Clause. May v. Cooperman, 780 F.2d 240, 253 (3d Cir. 1985); Doe v. Sch. Bd., 274 F.3d 289, 295 (5th Cir. 2001).

A. *Sustained—Georgia and Virginia*

Both the Fourth and Eleventh Circuit Courts of Appeals have upheld moment of silence laws.[45] In doing so, both Courts focused on the first prong of the *Lemon* test, finding secular purposes for the laws.[46] No religious purpose was given for the Georgia statute. A religious purpose was given for the Virginia statute, but it was accompanied by several secular purposes. The secular purposes in both statutes are similar: both claim to provide students with a quiet moment to start the school day, allowing them to collect their thoughts. The Virginia statute also claims the purpose of promoting the values of the Free Exercise clause of the First Amendment, which the court claims is a secular purpose.[47]

Despite the courts' holdings regarding secular purposes for these statutes, suggestions of an underlying religious purpose remain. Georgia's statute, while specifically stating that the moment of silence is not religiously motivated, also expressly ensures that no voluntary student prayer is prevented and suggests that the first two provisions must implicate student prayer.[48] The court dismissed the concerns over this provision, characterizing it simply as a preventative measure against misinter-

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45. The text of the Georgia statute reads:

> § 20-2-1050. Brief period of quiet reflection authorized; nature of period
>
> (a) In each public school classroom, the teacher in charge shall, at the opening of school upon every school day, conduct a brief period of quiet reflection for not more than 60 seconds with the participation of all the pupils therein assembled.
>
> (b) The moment of quiet reflection authorized by subsection (a) of this Code section is not intended to be and shall not be conducted as a religious service or exercise but shall be considered as an opportunity for a moment of silent reflection on the anticipated activities of the day.
>
> (c) The provisions of subsections (a) and (b) of this Code section shall not prevent student initiated voluntary school prayers at schools or school related events which are nonsectarian and nonproselytizing in nature.

GA. CODE ANN. § 20-2-1050 (1996).

The text of the Virginia statute reads:

> § 22.1-203. Daily observance of one minute of silence
>
> In order that the right of every pupil to the free exercise of religion be guaranteed within the schools and that the freedom of each individual pupil be subject to the least possible pressure from the Commonwealth either to engage in, or to refrain from, religious observation on school grounds, the school board of each school division shall establish the daily observance of one minute of silence in each classroom of the division.
>
> During such one-minute period of silence, the teacher responsible for each classroom shall take care that all pupils remain seated and silent and make no distracting display to the end that each pupil may, in the exercise of his or her individual choice, meditate, pray, or engage in any other silent activity which does not interfere with, distract, or impede other pupils in the like exercise of individual choice.
>
> The Office of the Attorney General shall intervene and shall provide legal defense of this law.

VA. CODE. ANN. § 22.1-203 (2000).

46. While both courts do go on to examine the second and third prongs of the *Lemon* test, neither court dwells very long on those issues. *Bown*, 112 F.3d at 1472-74; *Brown*, 258 F.3d at 277-78.

47. The court observed that "the Establishment Clause [does not] preclude a government from 'accommodating' religious scruple . . . ." *Brown*, 258 F.3d at 274. The court held that the intent to accommodate religious practices is a secular purpose, not a religious one. *Id.* at 276.

48. GA. CODE ANN. § 20-2-1050(c) (1996).

pretation of the first two provisions in the statute.[49] The legislative history surrounding the statute also provided evidence of latent religious motivations.[50] However, the court downplayed these motivations, drawing a distinction between "the legislative purpose of the statute . . . [and] the possibly religious motives of the legislators who enacted the law."[51] Drawing such a distinction seems disingenuous,[52] as the court appeared willing to look past even the type of motivations that the *Jaffree* Court held unconstitutional.[53]

Virginia, too, appears to have religious motives lurking behind its moment of silence statute. The plain language of the statute mentions prayer as a potential exercise during the minute of silence.[54] When the Fourth Circuit analyzed the statutory language, it dismissed the mention of prayer as just one of a list of potential practices.[55] Additionally, the legislative history suggested a religious motivation for the statute, which was also swept away by the court. The court focused on the aspects of the legislative history that support a secular purpose,[56] while ignoring those aspects that support a religious purpose.[57] The court even looked past the fact that the same Virginia legislature passed a joint resolution opposing the holding of *Engel v. Vitale* and calling for a constitutional amendment to restore prayer to the public classroom.[58] Although the

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49. *Bown*, 112 F.3d at 1474.

50. The original bill was to create a time for prayer in the classroom, not merely a moment of quiet reflection. Several legislators also spoke fervently about the reintroduction of prayer into the public schools, and an amendment referring specifically to school prayer was "overwhelmingly supported." *See* Larry R. Thaxton, *Silence Begets Religion:* Bown v. Gwinnett County School District *and the Unconstitutionality of Moments of Silence in Public Schools*, 57 OHIO ST. L.J. 1399, 1430-31 (1996).

51. *Bown*, 112 F.3d at 1471-72.

52. If legislative purpose is not a composite of the individual motives of those legislators who enact a statute, what is it?

53. Now that the Eleventh Circuit has upheld Georgia's statute as constitutional, state legislators seem more willing to explicitly encourage prayer during the mandated moment of silence. On January 31, 2002, Georgia legislators introduced a bill that would "clarify" the uses of the moment of silence, reminding students that their First Amendment rights entitle them to pray during that moment if they so choose. *See* H.B. 1171, 146th Gen. Assem., Reg. Sess. (Ga. 2002). *See also* S.B. 402, 146th Gen. Assem., Reg. Sess. (Ga. 2002) (providing for similar clarification). The Georgia Senate has also introduced a bill that would provide a three-minute period for students to voluntarily speak about their religious beliefs. This "educational period" would be held immediately before the mandated moment of silence. *See* S.B. 331, 146th Gen. Assem., Reg. Sess. (Ga. 2002).

54. VA. CODE ANN. § 22.1-203 (2000).

55. *Brown*, 258 F.3d at 276.

56. *Id.* at 277 (emphasizing the use of a moment of silence to settle students before starting the day).

57. The sponsor of the bill firmly stated that his intent was not to return prayer to public schools, while maintaining that "[t]his country was based on belief in God." *Brown*, 258 F.3d at 271. Other senators also voiced concerns about the religious nature and purpose of the statute. *Id.* at 271-72.

58. *Brown*, 258 F.3d at 284 (King, J., dissenting). The court also ignored the fact that the Virginia legislature provided for legal defense of the moment of silence statute as a provision of that statute. This provision suggests that the legislature was aware of the Establishment Clause issues inherent in these statutes and intended to press the issue with the courts. *Id.* Combined with the joint resolution, this provision suggests that the legislature was willing to try a number of different tactics to restore prayer to the public classroom. *Id.*

religious motives behind the statute seemed clear, the court found them irrelevant and upheld the statute.[59]

Both circuit courts espoused a high level of deference to the legislative decision-making process when evaluating the stated secular purpose of these moment of silence statutes.[60] The willingness of these circuit courts to turn a blind eye to legislative purpose[61] and to the history from which these laws were born[62] signals a frightening turn of events. While legislatures are due some level of deference as a co-equal branch of government, an overly deferential approach robs the courts of their role in upholding the constitutional rights of all citizens.[63]

B. Invalidated—New Jersey and Louisiana

In contrast, two other courts of appeals have invalidated moment of silence statutes as unconstitutional violations of the Establishment Clause.[64] In addition to representing the bookends of post-*Jaffree* moment of silence jurisprudence,[65] these cases also dealt with two very different statutes.[66] While the wording of the statutes may not seem to be

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59. *Id.* at 270-72. As in Georgia, the Virginia legislature seems willing to test the limit of school prayer jurisprudence. Once certiorari was denied for *Brown*, the Virginia legislature introduced a bill that would amend the statute to require school officials to expressly inform students of the purpose of the moment of silence. The purpose, as stated by the statute, is to guarantee "the right of every pupil to the free exercise of religion." *See* H.B. 135, 2002 Leg. (Va. 2002). Both houses of the Virginia state legislature have also passed bills that would require public schools to post signs reading "In God We Trust." *See* H.B. 108, 2002 Leg. (Va. 2002); S.B. 608, 2002 Leg. (Va. 2002). These bills have now passed both Houses and were signed into law by Virginia's governor on May 17, 2002.

60. *Bown*, 112 F.3d at 1469; *Brown*, 258 F.3d at 276 (referring specifically to the level of deference espoused by Justice O'Connor's concurring opinion in *Jaffree*).

61. The legislative history for both statutes has several examples of the religious motivations of the sponsors and other supporters. State Senator Warren Barry, sponsor of the Virginia statute, was asked about his intent for the moment of silence statute. He answered that "[t]his country was based on belief in God, and maybe we need to look at that again." *Brown*, 258 F.3d at 271. An unofficial transcript of the Georgia General Assembly reveals that a number of House members took positions, for and against the statute, based on a belief that it would institute school prayer. *Bown*, 112 F.3d at 1467.

62. *See infra* Part IV.

63. The Supreme Court has repeatedly emphasized that the courts have a duty to look into legislative decisions in Free Exercise and Establishment Clause claims, to distinguish legitimate secular purposes from ones that are merely a smokescreen for religious purposes. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000); City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (stating that "Congress' discretion is not unlimited . . . and the courts retain the power . . . to determine if Congress has exceeded its authority under the Constitution.").

64. May v. Cooperman, 780 F.2d 240 (3d Cir. 1985); Doe v. Sch. Bd., 274 F.3d 289 (5th Cir. 2001).

65. *May* was decided only months after *Jaffree* was decided, and *School Board* was just decided in December 2001.

66. The text of the New Jersey statute provided:

§ 18A:36-4. Period of silence

> Principals and teachers in each public elementary and secondary school of each school district in this State shall permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection.

N.J. STAT. ANN. § 18A:36-4 (West 1985).

very different, their enactment was. The New Jersey statute, as challenged, was enacted as a whole; however, the Louisiana statute was amended before passing.

Jaffree had only been law a few months when the Third Circuit found that the New Jersey statute violated the Establishment Clause under the *Lemon* test.[67] While the court examined all three prongs of the *Lemon* test, it found that the New Jersey statute only violated the first prong, because it lacked a secular purpose.[68] Unlike the courts that considered the Georgia and Virginia statutes, the Third Circuit was willing to look beyond the purported secular legislative motive. The court held that the secular purpose, "to provide a transition from nonschool life to school life," was pretextual and therefore insufficient to save the statute from an Establishment Clause challenge.[69] In prior years, the New Jersey legislature had attempted to reintroduce prayer into the public schools a number of different ways, and the court took that history into account when evaluating the stated purpose for the moment of silence statute.[70]

While the court did not find a legislative intent to encourage prayer over other activities during the mandatory moment of silence, it did conclude that the "purpose of accommodating the religious beliefs of some students is itself a religious purpose."[71] In the end, the court asked if it was permissible for "the state, . . . while not endorsing prayer in preference to other forms of silent activity, [to provide] for a minute of silence for the purpose of permitting prayer by those who want to pray."[72] The answer from the Third Circuit was a solid "no."[73]

The text of the Louisiana statute provided:

§ 2115 *[Silent prayer] Prayer* or meditation; pledge of allegiance

> A. Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in *[silent] prayer or* meditation. The allowance of a brief time for *[silent] prayer* or meditation shall not be intended nor interpreted as state support of or interference with religion, nor shall such time allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion.

LA. REV. STAT. ANN. 17:2115(A) (West 1999) (emphasis added) (bracketed material deleted by amendment).

67. *May*, 780 F.2d at 253.

68. *Id.* at 241 ("[This] appeal requires that we assess the impact on the district court's ruling of the subsequent decision of the Supreme Court in *Wallace v. Jaffree*") (citation omitted).

69. *Id.* at 251. The Third Circuit accepted the district court's finding that the purpose was pretextual. *Id.*

70. *Id.* at 251-52. The court also considered testimony from educational experts and witnesses at the legislative hearings before concluding that the stated purpose was but a sham. *Id.* at 252.

71. *Id.* at 252. The court goes on to state that a finding that the New Jersey statute was intended to promote prayer was not sustainable, but that the purpose of accommodation of certain religious beliefs was sufficient to render the statute unconstitutional. *Id.*

72. *Id.* at 252.

73. *Id.* at 253.

In contrast to the New Jersey statute, the Louisiana statute originally created a moment of silence, but was amended in an effort to restore prayer to public classrooms. The statute was amended twice, first to add the words "prayer or"[74] to the possible uses for the moment and later to remove the word "silent"[75] to allow for vocal prayer.[76] In *Doe*, the Court of Appeals for the Fifth Circuit held that the statute as amended was unconstitutional.[77] Drawing a comparison to *Jaffree*, the court found that the only viable purpose for the 1999 amendment removing the word "silent" was to "authorize *verbal* prayer in schools."[78] Because the court found no secular purpose for the statute, it did not consider the other prongs of the *Lemon* test.[79]

These four cases provide some guidance as to the constitutionality of moment of silence statutes. However, the lack of clarity left after *Jaffree* remains and the tension between two ideals endures. Although courts must show appropriate deference to legislative decisions, they must also fulfill their duty to ensure that those decisions are not based on impermissible motives. The history of these statutes weighs heavily on them, and courts must work harder to ignore that history than to consider it. Part IV illustrates how, even with appropriate deference to legislatures, courts must find moment of silence statutes unconstitutional.

IV. CAN A MOMENT OF SILENCE BE CONSTITUTIONAL: WHY *JAFFREE* GOT IT RIGHT—AND HOW IT GOT IT WRONG

Jaffree seems to leave the constitutional door ajar concerning moment of silence laws. While the Court clearly stated that such laws are unconstitutional when enacted for solely religious purposes, it does not speak to laws with both religious and secular purposes.[80] The Court, in both majority and concurring opinions, seems to suggest that such laws might pass constitutional muster if they had a secular motive for their

74. *Doe*, 274 F.3d at 291 (citing the 1992 amendment).

75. *Id.* (citing the 1999 amendment).

76. The text of the Louisiana statute provided:

§ 2115 *[Silent prayer] Prayer* or meditation; pledge of allegiance

A. Each parish and city school board in the state shall permit the proper school authorities of each school within its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in *[silent] prayer or* meditation. The allowance of a brief time for *[silent] prayer* or meditation shall not be intended nor interpreted as state support of or interference with religion, nor shall such time allowance be promoted as a religious exercise and the implementation of this Section shall remain neutral toward religion.

LA. REV. STAT. ANN. 17:2115(A) (West 1999) (emphasis added) (bracketed material deleted by amendment). The Louisiana State Legislature has since amended and re-enacted § 17:2115(A), restoring the word "silent" to the statute. *See* Act of April 18, 2002, No. 56, § 17:2115(A), 2002 La. Sess. Law Serv. 1st Ex. Sess. (West) (amended and reenacted).

77. *Doe*, 274 F.3d at 290. Both the language of the statute and the legislative history of the amendment supported this holding.

78. *Id.* at 294.

79. *Id.* at 293. The court also did not consider any endorsement or coercion issues.

80. Wallace v. Jaffree, 472 U.S. 38, 66 (1985).

enactment.[81] The Court does not, however, address the role the history of moment of silence laws might play in the determination of whether such laws are constitutional. As the Court does not squarely address the issue, the question remains as to what fate such a law would face if a clearly stated secular purpose were given for its enactment, either alone or in tandem with a religious purpose.

While there might have been a time when moment of silence laws could have been enacted in a constitutional manner, that time is past. Regardless of any stated meaning by the legislature, the history of moment of silence laws is too uncomfortably blurred with school prayer. This Part addresses the difficulties in applying the motivational test the Court implies, as well as concerns of free exercise and the special role of children in Establishment Clause issues. As the Court has yet to select a single test for evaluating all Establishment clause challenges, this Article will examine three of the "leading contenders:" the *Lemon* test, the endorsement test, and the coercion test.

A. The Lemon *Test: Silence with a Secular Purpose?*

For more than 30 years, the Court has used a test, originally set forth in *Lemon v. Kurtzman*,[82] that examines three aspects of a statute challenged as violating the Establishment Clause.[83] The Court has continued to use this test, despite criticism from both within and outside the Court, ever since.[84] In *Jaffree*, the Court applied the *Lemon* test, but only examined the first prong of the test—whether a statute has a secular purpose for enactment.[85] The majority found that the clearly stated purpose for the Alabama moment of silence law was to return prayer to the public classroom.[86]

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81. *Jaffree*, 472 U.S. at 66.

82. 403 U.S. 602 (1971).

83. First, the statute must have a secular purpose; second, the statute cannot have the primary effect of advancing or inhibiting religion; third, the statute cannot cause excessive entanglement between religion and government. *Id.* at 612-13.

84. The *Lemon* test has indeed come under a great deal of fire from within the Court, with Chief Justice Rehnquist and Justice Scalia being two of its more outspoken critics. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398-400 (1993) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . ."). *But see Jaffree*, 472 U.S. at 63 (Powell, J., concurring) ("It [the *Lemon* test] is the only coherent test a majority of the Court has ever adopted."); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (citing *Lemon* as justification for examining the purpose of a policy); Steven G. Gey, *Religious Coercion and the Establishment Clause*, 1994 U. ILL. L. REV. 463, 470 (1994) (arguing that the "operative terms" of *Lemon* would serve to maintain church-state separation).

85. *Jaffree*, 472 U.S. at 55-56. The second and third prongs of the *Lemon* test are not examined by courts in the same detail as the first prong when considering moment of silence laws. *See Id.* Therefore, I will only examine the first prong in this Article.

86. *Id.* at 59-60.

In applying the *Lemon* test, the Court first looks to see if the challenged statute has a secular purpose.[87] If a statute has both secular and religious purposes, the secular purpose must be the primary purpose and not merely pretextual.[88] However, the secular purpose need not be exclusive; the Court has held that the government may "[recognize] the important part that religion or religious organizations may play in resolving certain secular problems."[89] Once the legislature establishes a secular purpose for a program or policy, the government's claim is generally given deference.[90] However, the secular purpose must be "sincere and not a sham."[91] If challenged, the validity of the secular purpose may be evaluated by considering events surrounding the initial decision to enact the statute.[92]

Moment of silence laws face a real problem concerning their purpose of enactment. *Jaffree* has already established that if the statute is passed solely to satisfy a religious purpose, such as returning prayer to public schools, it cannot pass constitutional muster. But what about statutes where the legislature claims a dual purpose for the statute—both religious and secular—or even a purely secular purpose? The majority in *Jaffree* seems to say that dual secular and religious purposes *may* preserve the constitutionality of a moment of silence law.[93] And if the legislature claims solely a secular purpose for the statute, the first prong of the *Lemon* test seems to be met.

But the secular purpose must not be a pretexual purpose, a sham, or a cloth drawn over the eyes of the court. Courts have the duty to investigate the stated secular purpose to ensure that it is a true purpose for the statute. Although Congress (as well as state legislatures) must be given deference in its decision-making, that deference cannot not be complete if courts are to fulfill their duties. When examining or interpreting a piece of legislation, the courts must consider the circumstances surrounding the creation of that statute as well as the stated goals of the legislature.[94] Recently, the Court has shown its willingness to look beyond the surface motivations of school officials to examine the true intent of pro-

87. *Lemon*, 403 U.S. at 612.
88. *Id.*
89. Bowen v. Kendrick, 487 U.S. 589, 607 (1988).
90. Edwards v. Aguillard, 482 U.S. 578, 596 (1987).
91. *Id.* at 587.
92. *Id.*
93. *Jaffree*, 472 U.S. at 56. The majority does not make a clear statement about the constitutionality of such a statute. Justice Stevens mentions the possibility of a secular motivation saving the statute before moving on to definitively invalidate such statutes if motivated solely by religious reasons. *Id.*
94. *See* United States v. Champlin, 341 U.S. 290, 297 (1951) (stating that "[t]he statute cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent. The circumstances and the evil are well-known."). The circumstances of any moment of silence law must necessarily include the ongoing struggle by some political factions to restore prayer to public schools. *See supra* notes 82-86 and accompanying text.

moting prayer in public schools in other related situations.[95] The Court must surely take the same care in probing behind stated purposes for the legislative intent for moment of silence laws.

From the moment that prayer in public schools was held to be unconstitutional, certain interest groups have been fighting for reinstatement.[96] On the federal level, numerous statutes and constitutional amendments have been introduced that would restore prayer to public schools in one form or another.[97] These bills started by reintroducing "prescribed prayer in public schools, [then moved] to prayer, to nonsectarian prayer, to nondenominational prayer, to voluntary prayer, to a voluntary moment of silence."[98] A proposed House amendment from 1971 shows the evolution of these bills from a call for a restoration of prayer in schools to a moment of silence (intended for prayer).[99] Congress has also attempted to restrict the Supreme Court's jurisdiction in this area with bills that would strip the Court of the power to hear "any case arising out of any state statute . . . which relates to voluntary prayers in the public schools and public buildings."[100]

On a state and local level, governments have supplemented federal attempts to restore prayer to public classrooms. State legislatures continued to enact statutes mandating prayer in public schools, ignoring the

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95. *Santa Fe*, 530 U.S. at 305-06. School officials attempted to allow student prayer before each football game, claiming that the content of the message was up to the student. *Id.* The student who was to deliver the message was elected by his or her peers, supposedly separating the potential religious message and the school officials even further. *Id.* However, the Supreme Court refused to allow the claim that the school was merely trying to "promote good sportsmanship" and invalidated the program. *Id.*

96. The reaction to the school prayer decisions was sudden and vigorous. *See* Abington Township v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 436 (1962). The day *Engel* was handed down was dubbed "Black Monday" in some quarters, and one senator went so far as to say that "[t]he Supreme Court has made God unconstitutional." LYNN R. BUZZARD, SCHOOLS: THEY HAVEN'T GOT A PRAYER 44 (1982). After *Schempp* was decided, numerous school officials and state superintendents announced their decision to ignore the Supreme Court and proceed with various forms of prayer in their schools, calling those who supported the decision "atheists, free thinkers, ultraliberals, a bunch of crackpots, and inverse bigots." *Id.* at 57.

97. These statutes and amendments have called for non-denominational prayers, voluntary prayers and silent prayers, among other variations. Examples include the 1966 Dirksen Amendment ("providing for or permitting the voluntary participation of students or others in prayer"); the 1971 Wylie Amendment (supporting first nondenominational, then voluntary, prayer in public buildings); and the 1981 Voluntary School Prayer Act (withdrawing jurisdiction from the Supreme Court in claims relating to voluntary school prayers). *Id.* at 60-61, 67.

98. ROBERT S. ALLEY, SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT 172 (1994). Two of the newest forms this impulse has taken are moments of silence and student-initiated, nondenominational, nonproselytizing prayers at events such as graduation. *Id.*

99. The original text of the 1971 amendment, introduced by Rep. Chalmers Wylie (Ohio), was:

> Section 1. Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in nondenominational prayer.

Id. at 169.

100. Donald E. Boles, *Religion and the Public Schools in Judicial Review*, *in* RELIGION: THE STATE AND EDUCATION 49 (James E. Wood, Jr. ed., 1984).

unconstitutionality of such statutes.[101] A number of state legislatures also called for Congress to enact a "voluntary prayer amendment."[102]

Some courts and commentators would infer that *Jaffree* stands for the proposition that a moment of silence law is constitutional so long as the legislature does not acknowledge its intent to restore prayer to public schools. Among others, Justice O'Connor has voiced her concern of courts giving too little deference toward legislative decisions.[103] While Justice O'Connor may have "little doubt"[104] that the courts will be able to winnow out the sham secular purposes from the legitimate ones, the extreme level of deference she suggests for this investigation will hobble most judges. This rationale forces a questionable situation on legislatures and courts. If the Court really means to allow moment of silence laws, on the condition that the legislature itself is silent about any religious purpose for the law, this creates an awkward and easily exploitable situation for legislatures. Given the long history of the battle over prayer in public schools, this rationale is absurd if moments of silence are but the newest battlefield in that war.[105] To uphold such statutes so long as no religious purpose is stated, or at least is accompanied by a secular purpose, encourages legislators to wink at the requirements of the Establishment Clause and bring school prayer back in disguise.

Even some commentators who argue that moment of silence laws are or can be constitutional admit that the "political origin" of these laws was the war over prayer in public schools.[106] While states may claim any number of secular purposes for moment of silence laws,[107] it is unlikely that states would pass any of these laws if the history of school prayer were different or nonexistent.[108] These admissions, along with the his-

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101. David Z. Seide, *Daily Moments of Silence in Public Schools*, 58 N.Y.U.L. REV. 364, 366-67 (1983).

102. *See id.* at 366. By 1983, six states had called for such an amendment—Illinois, Kansas, Nevada, North Carolina, Virginia, and Washington. More have called for such an amendment since then. *See supra* note 4.

103. *Jaffree*, 472 U.S. at 74 ("[T]he inquiry into the purpose of the legislature in enacting a moment of silence law should be deferential and limited.").

104. *Id.* at 75.

105. Douglas Laycock observes that "many legislatures and teachers have used these moments of silence to officially encourage prayer," arguing that the problem with the laws is in the implementation, not the enactment. Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 6 (1986).

106. Laycock, for example, freely admits the origins of the moment of silence in public schools, seeing them as direct "resistance to the Supreme Court's ban on school-sponsored prayer." *Id.* at 5-6. He argues that despite this origin such laws can still be constitutional. *Id.*

107. Examples of secular purposes given for such laws include: to provide time for quiet reflection on the day ahead, to combat the problem evidenced by the violence at Columbine, to maintain order in the classroom, or to focus students on the coming day. *See, e.g.*, Bown v. Gwinnett County Sch. Dist., 112 F.3d 1464, 1472 (11th Cir. 1997) (stating that the secular purpose of the law is "to provide students with a moment of quiet reflection to think about the upcoming day"); May v. Cooperman, 780 F.2d 240, 244 (3d Cir. 1985) (suggesting a secular purpose of "providing a calm transition from nonschool life to school work").

108. Laycock notes that these laws are clearly passed "in order to accommodate religious thought." Laycock, *supra* note 105, at 62.

tory of these laws, make it difficult to see how a legislature could legitimately claim a secular purpose. While a brief moment of silence at the beginning of the school day may serve many purposes, legislators would not attempt to mandate one if prayer had not been removed from public schools.

B. Free Exercise Concerns

Proponents of moment of silence laws argue that without such laws, public school students will be unable to pray during the school day, in violation of their Free Exercise rights guaranteed by the First Amendment.[109] However, this is a specious argument. Nothing in the Supreme Court's Establishment Clause jurisprudence prevents a public school student from silently praying during a lull in school activities. Many such moments occur during the regular school day—lunchtimes, the moments between classes or lessons, the bus ride or walk to school. A specially created moment is not required for students to have a chance to exercise their right to silently pray.[110]

The Court has also held that when the Establishment and Free Exercise clauses of the First Amendment come into conflict, the Establishment Clause must predominate.[111] Arguably, the combination of the two clauses means that religious beliefs and practices are "altogether private," making their intrusion into the public world of education improper.[112] Also, citizens claiming that their right to free exercise has been violated must show how the government, through the enactment of laws, has infringed on that right.[113] Public school students are expected to keep their minds on their studies throughout the structured part of the school day; they are allowed neither to pray nor to read the daily newspaper. The free exercise of their religious practices is not singled out for special treatment. On the other hand, students are permitted to engage in

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109. In fact, at least one Justice in the *Jaffree* decision felt that this was a real danger. Justice O'Connor voiced concerns about balancing the competing demands of the Free Exercise and Establishment Clauses. *Jaffree*, 472 U.S. at 81–84 (O'Connor, J., concurring).

110. In fact, some might argue that more prayer occurs as a test is being handed out than during any state-mandated moment. *See* Herdahl v. Pontotoc County Sch. Dist., 933 F. Supp. 582, 599 (N.D. Miss. 1996); T.C. Mattocks, *Reflections on Santa Fe v. Doe: Is Student Prayer at Graduation Still an Option?*, 150 ED. LAW REP. 333, 334 (2001).

111. "[T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." Cantwell v. State of Conn., 310 U.S. 296, 303–04 (1940). The Establishment Clause embodies the first concept; the Free Exercise Clause the second.

112. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 52 (1947) (Rutledge, J., dissenting). Justice Rutledge, joined by Justices Frankfurter, Jackson, and Burton, argues that the word "religion" in the First Amendment means just that–religious teaching, training, or practices—and is not to be confused with a church. *Id.* This definition supports the theory that the prohibition that the Founding Fathers sought to impose was broader than simply banning the establishment of an official church by the government. Thus, encouraging prayer by students in public schools is just as forbidden as establishing one church as "official." *Id.*

113. *Schempp*, 374 U.S. at 223 ("[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion.").

any non-disruptive activity that they choose during the non-structured parts of the day (i.e., the lunch period). Students who choose to pray or read religious texts are certainly free to do so at these times; no specially created "moment of silence" is needed to give students an opportunity for these activities during the school day.[114]

Claims that public students will be isolated from their religious beliefs are also difficult to credit. Supporters of moment of silence laws, or of an actual return of vocal prayer to public classrooms, claim that students are taught that their religion is false or unimportant by its lack of presence in their daily curriculum.[115] However, if parents and religious institutions are unable to impart lasting religious instruction without the presence of religion in a child's daily school life, it is unlikely that a minute of prayer each day is likely to alter that result.[116]

C. *Endorsement*

Beyond the lack of a secular purpose, another problem with moment of silence laws is the appearance of government endorsement of religion. The Court sometimes uses an endorsement test,[117] instead of or in addition to the *Lemon* test.[118] Under this test, the government cannot promote or favor religion or give the appearance of promoting or favoring religion in the eyes of a reasonable and informed observer.[119] Such endorsement is prohibited because it would tend to express the idea that non-religious

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114. One fallacy promoted by those who would restore prayer to public schools is that, as the law now stands, students are prevented from silently praying on their own time during the school day. Nothing in any of the Supreme Court's Establishment Clause decisions prevents a student from silently praying at lunch, between classes, or at other free moments during the day. *See, e.g.*, Robert M. O'Neil, *Who Says You Can't Pray?*, 3 VA. J. SOC. POL'Y & L. 347, 366 (1996) (stating "individual students may not be prevented from bowing their heads and praying during the school day"); John M. Swomley, *Myths About Voluntary School Prayer*, WASHBURN L.J. 294, 297 (1996) (stating that the Supreme Court "did not attempt to prohibit individual silent prayer, or grace before meals or audible prayer in informal settings such as a cafeteria").

115. Andrew W. Hall, *A Moment of Silence: A Permissible Accommodation Protecting the Capacity to Form Religious Belief*, 61 IND. L.J. 429, 431-32 (1986). Hall suggests that students will reject their religious beliefs if those beliefs are not reinforced by the public schools. He calls the removal of religion from the public school curriculum "a negative form of religious training" and fears that the public school children will have but an "ideological void" in their moral development. *Id.* He discards the possibility that parents, in conjunction with religious institutions, can and should be the source of more "positive" religious training, not the public schools. *Id.* Rather, he states that without the presence of religious training in the public schools, students will be at the mercy of "the beliefs of the instructor or the creation of a secular ideology" in forming their moral compass. *Id.* at 433.

116. The Court has specifically noted that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Santa Fe*, 530 U.S. at 310 (citing Lee v. Weisman, 505 U.S. 577, 589 (1992)).

117. First articulated in Lynch v. Donnelly, 465 U.S. 668, 688-92 (1984) (O'Connor, J., concurring).

118. In fact, the endorsement test has been used as recently as 2000 by a majority of the Court to examine an Establishment Clause challenge. *See Santa Fe*, 530 U.S. at 308.

119. *See, e.g.*, Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 776-77 (1995) (O'Connor, J., concurring) (stating that "when the reasonable observer would view a government practice as endorsing religion, . . . it is our *duty* to hold the practice invalid").

citizens, or citizens not of the faith being endorsed, are "outsiders, not full members of the political community."[120] Often, the Court looks to "expression by the government itself . . . or else government action alleged to discriminate in favor of private religious . . . activity"[121] to determine whether there has been an unconstitutional endorsement of religion. Justice O'Connor states the test for endorsement as "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[122] While Justice O'Connor feels that moment of silence laws, properly enacted,[123] could pass this test, such confidence may be misplaced.

Silence can speak louder than legislators. Despite a hypothetical legislature's silence as to any religious motive for a moment of silence law, an objective observer can easily make the connection. With a long history directly linking the emergence of these laws with the abolition of prayer from the public schools,[124] an objective observer cannot help but conclude that the legislative purpose behind these laws is to restore school prayer. As students are already free to pray silently during any momentary lull in the school day, setting aside a moment of silence specifically to accommodate prayer sends the message that religious belief, or at least some forms of it, will be accommodated.[125] That the majority of the community embraces the religious belief or practice that is favored does not remove the constitutional concern and may in fact enhance it; those in the community who do not embrace that, or any, religious belief are also entitled to protection.[126] The very history of moment of silence laws may make the appearance of government endorsement inevitable.

D. Coercion and Kids—a Special Situation

Under a third theory of evaluating Establishment Clause cases, the Court looks to see if there is any sort of government coercion of religious

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120. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring).

121. *Pinette*, 515 U.S. at 764.

122. *Jaffree*, 472 U.S. at 76.

123. For the statute to be properly enacted, it would have to permit prayer but not specifically endorse it. *Id.*

124. *See supra* notes 96-102 and accompanying text.

125. *See* Walter Dellinger, *The Sound of Silence: An Epistle on Prayer and the Constitution*, 95 YALE L.J. 1631, 1637 (1986). Dellinger, in this open letter to Congress, draws the connections between the history of school prayer and moment of silence statutes. He sees the connection as even clearer when the statute specifically mentions prayer as a possible activity during that moment. *Id.* at 1636.

126. *See Santa Fe*, 530 U.S. at 312. Protection of adherents of minority religions grows more important each day, given our increasingly multi-cultural society. Ironically, this very diversity of beliefs threatens some who would return prayer and other religious practices to our public schools. After all, "the real problem is that Jews and atheists are pushing Christianity out of the public schools." Marc W. Brown, *Christmas Trees, Carols and Santa Claus*, 28 J.L. & EDUC. 145, 163-64 (1999).

practices.[127] No one may be forced to "support or participate in religion or its exercise."[128] Even when individual choices appear to be involved, the government must be careful that hidden coercion does not exist.[129] *Santa Fe* recognized the powerful role that peer pressure can play in determining the presence or absence of coercion.[130] Moment of silence laws, especially when combined with the force of student peer pressure, carry the risk of such coercion.[131]

The concern about the potential coercive effect of moment of silence statutes takes on deeper nuances because of the audience involved—children. The Court has repeatedly voiced concerns about the potential for government coercion when the challenged statute involves schools and/or children,[132] and has even considered mandatory school attendance coercive government action.[133] Government action need not involve direct coercive pressure to participate in religious practices, but may instead be more subtle, indirect coercion.[134] In decisions as early as *Lemon*, the Court focused on "[the] process of inculcating religious doc-

127. Justice Kennedy has been a recent champion of a coercion test in the Court's Establishment Clause jurisprudence. He first articulated this view in *Allegheny v. ACLU*, 492 U.S. 573, 660-63 (1989) (Kennedy, J., concurring in part and dissenting in part). As part of this test, Justice Kennedy states that government may not advance religion through coercive action. *Id.* This test remains in use, as recently as 2000. *See Santa Fe*, 530 U.S. at 302.

128. *Santa Fe*, 530 U.S. at 314.

129. Coercion does not always need to be overt; the circumstances surrounding a given act might result in coercion even if none is obvious or intended. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." Engle v. Vitale, 370 U.S. 421, 431 (1962).

130. *Santa Fe*, 530 U.S. at 317 ("[T]he government may no more use social pressure to enforce orthodoxy than it may use more direct means.").

131. Justice Kennedy has noted the special problems inherent in dealing with students, realizing that the "line between voluntary and coerced participation may be difficult to draw." Bd. of Educ. Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring in part). Other courts have also noted the difficulty in establishing that participation in religious activities is truly voluntary, when the participants are minors. *See, e.g.*, Doe v. Porter, 188 F. Supp. 2d 904, 913 (E.D. Tenn. 2002).

132. The Ninth Circuit recently noted the Supreme Court's special attention to Establishment Clause cases involving public schools and children. *See* Newdow v. U.S. Congress, 292 F.3d 597, 605 (9th Cir. 2002). The court is concerned that the recitation of the Pledge of Allegiance, including the phrase "under God," will have a coercive effect on the children forced to either recite or at least listen to the Pledge on a daily basis. The "age and impressionability of schoolchildren, and their understanding that they are required to adhere to the norms set by their school, their teacher and their fellow students" are of especial concern to the court. *Id.* at 611. The Ninth Circuit found that the inclusion of the words "under God" in the Pledge was unconstitutional under all three tests the Supreme Court has used to evaluate Establishment Clause cases, including the *Lemon* test. *Id.* at 611. The Supreme Court reversed the Ninth Circuit, holding that Newdow lacked standing to challenge the Pledge on his daughter's behalf. Elk Grove Unified Sch. Dist. v. Newdow, 124 S. Ct. 2301, 2312 (2004).

133. Lisa Ness Seidman, *Religious Music in the Public Schools: Music to Establishment Clause Ears?*, 65 GEO. WASH. L. REV. 466, 482 n.127 (1997) (citing *Aguillard*, 482 U.S. at 584; *McCollum*, 333 U.S. 212). The Court has also taken notice of the special role public schools play in our society, pointing out the need for education free of divisive elements such as religious tenets. *Id.* at n.125.

134. *Id.* at 483-84. She notes that the Court has held indirect coercion—specifically the requirement to attend school—to be enough for a governmental practice to violate the Establishment Clause. *Id.* at 484 n.150 (citing *Schempp*, 374 U.S. at 223).

trine [being] enhanced by the impressionable age of the pupils, in primary schools particularly."[135] In *Jaffree*, both the majority[136] and Justice O'Connor's concurrence[137] raise concerns about the special challenges of mixing religion, government, and children.[138]

This concern for the special coercive pressure faced by students should not be lightly dismissed. While Justice O'Connor may "discern [no] serious threat to religious liberty"[139] from the creation of a daily moment of silence, the impressionability of school children cannot be discounted when evaluating these statutes. Supporters of moment of silence statutes argue that there is no coercive effect and therefore no Establishment Clause issue with them because silence is not inherently religious in nature.[140] While pure silence may not be inherently religious, the history of these statutes lends an association between prayer and silence that dooms these statutes regardless of their exact wording.[141] As explained above, the road that legislatures have traveled to arrive at moment of silence laws has been a long one—one directly linked to restoring prayer in public schools.[142] Such laws were never even considered until the Supreme Court held that mandatory prayer in public school classrooms was unconstitutional.[143]

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135. *Lemon*, 403 U.S. at 616. The Court continues to stress the importance of taking great care when evaluating Establishment Clause issues that involve children. *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 592 (1992); School Dist. v. Ball, 473 U.S. 373, 390 (1985) ("The symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice."); Aguillard, 482 U.S. at 583-84.

136. *Jaffree*, 472 U.S. at 61 n.51.

137. *Id.* at 81.

138. Concern about religious coercion of public school students also arises in a number of other settings. For example, the role of religious music in public school choirs and music classes has provided a battleground for those who would restore prayer to public schools. *See, e.g.* Seidman, *supra* note 133. Seidman explores the role of religious music in public schools, especially the case of *Bauchman v. West High Sch.*, 900 F. Supp. 254 (D. Utah 1995). She draws an analogy to moment of silence laws. Siedman, *supra* note 133, at 485. The Supreme Court has yet to decide how religious music and public schools may intersect the Establishment Clause, specifically denying certiorari in the *Bauchman* case. *See also* Skarin v. Woodbine Community Sch. Dist., 204 F. Supp. 2d 1195 (S.D. Iowa 2002) (challenging the school's practice of having students sing the Lord's Prayer during graduation ceremony). Student-led prayers at the beginning of high school football games have, however, already drawn the censure of the Court. *Santa Fe*, 520 U.S. at 317.

139. *Jaffree*, 472 U.S. at 73. Commentators have also drawn on O'Connor's language to downplay any potential coercion from a moment of silence. *See, e.g.* Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1037-39 (1989). Of course, some of the individuals striving to return prayer to public schools tend not to see any religiously motivated act as much of a threat and may be somewhat biased in their appraisal of a moment of silence. *See, e.g.*, Brown, *supra* note 126, at 160 (noting that members of a group opposed to the removal of religious celebrations from the public schools didn't see that "singing 'Silent Night' [in the public schools] puts you on the radical edge").

140. Johnson, *supra* note 139, at 1037-39.

141. *See supra* notes 96-102 and accompanying text.

142. *See supra* Part IV(A).

143. *See* BUZZARD, *supra* note 96, at 58 (noting a total of 147 amendments introduced in Congress to overturn *Engel* alone). Further, moment of silence laws in their current forms did not even become a possibility until legislatures had tried a number of mandatory and voluntary vocal prayer statutes, most of which were struck down as unconstitutional. *See, e.g.*, ALLEY, *supra* note

Finally, the implementation of moment of silence laws may inadvertently coerce students. While most statutes allow students to do whatever they wish during that moment, some students will receive the message that the time is set aside for them to pray. Whether they receive that message from their parents or their preacher, those students may look askance at a fellow student who instead chooses to spend one more minute catching up on his math homework, who pulls out her Harry Potter book to read a few more pages, or who steps into the hall to avoid feeling coerced to pray.[144] Some students may even receive the message that prayer is the favored way to spend the minute from their teachers or other school officials, lending weight to the idea that any student who visibly chooses not to pray is doing something wrong.[145] Peer pressure from these students will make those who choose not to pray uncomfortable and may force them into doing something they would rather not—pray or, at least, pretend to pray.[146] Finally, state legislatures in Virginia and Georgia have already begun to send the message that prayer is the favored activity during the mandatory moment of silence, lending more coercive weight to the implementation of these laws.[147]

The threat of student coercion resulting from a moment of silence in the morning may be small, but even small threats to the values embodied in the Constitution must be taken seriously.[148] Peer pressure among stu-

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98, at 175 (noting an attempt to change voluntary prayer to a moment of silence in a proposed amendment). This progression suggests that some legislators who seek to circumvent *Engel* and related decisions are willing to take small steps backward, until they find the maximum amount of school prayer that is permitted by the Constitution.

144. Some students are already feeling the coercive effects of moment of silence statutes. Jordan Kupersmith, a Virginia high school student, spends the beginning of each day in his principal's office rather than participate in the moment of silence. Kupersmith feels that the law is "unfair" and promotes prayer as a favored classroom activity. *See Gotta Minute? Virginia Enacts Minute of Silence in Schools*, WEEKLY READER, Jan. 26, 2001, at 3.

145. After the Supreme Court denied certiorari for *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001), the Loudoun County Virginia School Board decreed that students must be told "at least twice a year that they may pray . . . during the state-mandated daily minute of silence." *See* Rosalind S. Helderman, *Principals Must Explain Moment of Silence Rights*, WASH. POST, Nov. 15, 2001, at T01. The motion to require this emphasis on the right to pray was inspired by the September 11th terrorist attacks. *Id.* One board member said that the time was right for this emphasis, given the "calls to meditation and prayer by all of our leaders" following the attacks. *Id.*

146. Religious activities associated with the school outside the moment of silence lend weight to the peer pressure in the classroom. In Florida, after a student organized a "religious-outreach opportunity" at his school, he found that his "biggest reward" was that "[k]ids who used to crack jokes during the daily moment of silence now hold their tongues." Jodie Morse, *Letting God Back In*, TIME, Oct. 22, 2001, at 71. The implication in this new silence is that the school has sent the message that prayer is the appropriate or favored way to spend the moment of silence, and that dissenters may face consequences.

147. *See supra* notes 53 and 59.

148. The Court has expressed concern over the idea that small violations of the Constitution are somehow less important, or that they do not cause any great damage to our national values. Justice Black cited James Madison, the author of the First Amendment, who wrote:

> (I)t is proper to take alarm at the first experiment on our liberties . . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three

dents is a powerful force, and the underlying history of these moments of silence may lead to pressure—overt or covert—on students to pray during these moments. The fact that moment of silence laws do not support or denounce any particular religion does not mean that the general government support for religion should be ignored.

V. CONCLUSION

Our Constitution guarantees that individuals will not be forced to participate in religious activities against their own beliefs. It also guarantees that the government—both at the state and federal levels—will not use its power to establish an official religion, nor to favor religion over non-religion. This constitutional guarantee must be at its strongest in our public schools. Without a firm separation between church and state, impressionable students may feel coerced into religious activities and beliefs.

Moment of silence laws are but the current waypoint on the long school-prayer journey that started with *Engel*.[149] To uphold these laws, with their roots in mandatory prayer, as constitutional is a serious crack in the wall separating church and state, and for courts to look the other way, while legislators obscure their religious motivations, is to promote a farce that damages our constitutional guarantees.

> pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Engel v. Vitale, 370 U.S. 421, 436 (1962). The Court has also expressed concern about a whittling down of our constitutional protections in other instances. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 29 (1947) (Rutledge, J., dissenting) (concerned that "with time the most solid freedom steadily gives way before continuing corrosive decision").

149. Other contemporary challenges to the Supreme Court's jurisprudence on public life and prayer include school voucher programs and displays of the Ten Commandments. In Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002), the Supreme Court upheld a Cleveland, Ohio voucher program. The Court held that the program was neutral with respect to religion, and therefore did not violate the Establishment Clause. *Id.* at 2473. While most voucher systems permit the use of the funds in both secular and sectarian schools, Justice Souter's dissenting opinion pointed out that the vast majority of voucher students, and therefore voucher money, go to sectarian schools. *Id.* at 2494–95 (Souter, J., dissenting). Another current tactic for those who would restore prayer to public life is the posting of the Ten Commandments in public buildings, such as courthouses. Numerous challenges to such postings have arisen across the country. *See, e.g.*, Glassroth v. Moore, 229 F. Supp. 2d 1290 (M.D. Ala. 2002) (challenging the installation of a monument engraved with the Ten Commandments in the Alabama State Judicial Building); ACLU v. Mercer County, 219 F. Supp. 2d 777 (E.D. Ky. 2002) (challenging the posting of a framed copy of the Ten Commandments in the county courthouse).

IN SEARCH OF TRADITION: *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

INTRODUCTION

On November 18, 1863, Abraham Lincoln sat in his train on the way to Gettysburg.[1] As he contemplated the speech he was about to give, he surely realized that he was "giving people a new past to live with" when he "altered [the Constitution] from within, by appeal from its letter to the spirit."[2] Yet the lawyer in Lincoln might have been surprised to see the ways in which he was about to change the nation beyond the immediate struggle for union and emancipation.[3] The Gettysburg Address would be in large part the foundation of the Fourteenth Amendment.[4] From that text, much of the Bill of Rights was applied to the states.[5] A right to contract would be discovered, and then discarded.[6] A right to privacy would be found, limiting the states' abilities to interfere with a person's choices of contraception, abortion, and marriage.[7]

This Comment addresses *Goodridge v. Department of Public Health*,[8] the Supreme Judicial Court of Massachusetts' response to same-sex couples seeking marriage licenses. Part I gives the facts and procedural history of the case, and Part II provides background to put *Goodridge* in its historical context. Part III summarizes the majority, concurring, and dissenting opinions. Part IV suggests that the court did not address the true issue presented by the case, which is whether laws prohibiting same-sex marriage should receive the strict judicial scrutiny that accompanies a fundamental right, and argues that strict scrutiny is the proper standard.[9] This Comment concludes that protecting same-sex marriage as a fundamental right is in fact consistent with American history and tradition.

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1. GARRY WILLS, LINCOLN AT GETTYSBURG, 29-30 (Simon & Schuster 1992).
2. *Id.* at 38.
3. For an in-depth analysis of the Gettysburg Address, see WILLS, *supra* note 1.
4. *Id.*; *see generally* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 414-15 (Foundation Press 2001) (discussing the origins of the Civil War Amendments).
5. Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J., concurring).
6. Lochner v. New York, 198 U.S. 45 (1905).
7. Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Zablocki v. Redhail, 434 U.S. 374 (1978).
8. 798 N.E.2d 941 (Mass. 2003).
9. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

I. FACTS OF *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*

During a five-week period beginning in March 2001, numerous same-sex couples applied for marriage certificates in the Commonwealth of Massachusetts.[10] As required by General Laws c. 207 (hereinafter "G.L. c. 207"), the couples presented their "completed notices of intention to marry . . . forms to a Massachusetts town or city clerk, together with the required health forms and marriage license fees."[11] The parties agreed that all of the facial requirements necessary to receive the licenses were met.[12]

In all cases, the marriage licenses were denied "on the ground[s] that Massachusetts does not recognize same-sex marriage."[13] In response, plaintiffs filed a complaint on April 11, 2001, alleging "the exclusion of the [p]laintiff couples and other qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violate[d] Massachusetts law."[14] Each side sought summary judgment.[15]

The Superior Court granted summary judgment for the Commonwealth.[16] The judge held that there was no fundamental right to same-sex marriage and accordingly applied rational basis review.[17] He found that plaintiffs' constitutional rights were not violated under such a standard.[18] Plaintiffs appealed, and the Supreme Judicial Court considered the consolidated case of *Goodridge v. Department of Public Health.*[19]

II. BACKGROUND

A. The Evolution of the Fundamental Rights Doctrine

Goodridge v. Department of Public Health unfolds in the context of the debate that has continued since the nation's inception: does the Constitution offer only the protections that it specifically states, or are there rights not enumerated that enjoy similar protections?[20] The early discussion is well captured in the 1798 case of *Calder v. Bull.*[21] Justice Chase wrote: "There are certain vital principles in our free Republican Government, which will determine and overrule an apparent and flagrant abuse of legislative power . . . an ACT . . . (for I cannot call it a law)

10. Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941, 949 (Mass. 2003).
11. *Goodridge*, 798 N.E. 2d at 949-50.
12. *Id.* at 950.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 951.
18. *Id.*
19. *Id.* at 960.
20. SULLIVAN & GUNTHER, *supra* note 4, at 452.
21. 3 U.S. 386 (1798).

contrary to [this] principle . . . cannot be considered a rightful exercise of legislative authority."[22] Justice Chase's position drew on the idea of natural law, viewing "a written constitution not as the initial source [of a law] but as a reaffirmation of a social compact preserving pre-existing fundamental rights—rights entitled to protection whether or not they were explicitly stated in the document."[23] Dissenting in *Calder*, Justice Iredell stated: "Some speculative jurists have held, that a legislative act against natural justice must, in itself, be void . . . , [however] the ideas of natural justice are regulated by no fixed standard: the ablest and purest men have differed on the subject . . . ."[24]

Justice Chase's ideas had origins within the highest tradition of English Law.[25] Sir William Blackstone had written: "Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter . . . so, when he created man . . . he laid down certain immutable laws . . . and gave him the faculty of reason to discover the purport of those laws."[26] Winston Churchill described the views of Chief Justice Sir Edward Coke in a similar way: "Coke himself was reluctant to admit that law could be made, or even changed. It existed already, merely awaiting revelation and expostulation."[27]

The debate continued upon enactment of the Fourteenth Amendment in 1868. The initial case law took a narrow approach similar to Justice Iredell's, viewing the Fourteenth Amendment as merely having a purpose to end slavery and ensure racial equality.[28] For example, initial attempts at the Incorporation Doctrine, whereby the Bill of Rights was applied to the states, failed.[29] In *The Slaughter-House Cases*, Justice Miller wrote:

> When the effect [of the Fourteenth Amendment] is to fetter and degrade the state governments by subjecting them to control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when it in fact radically changes the whole theory of the relations of the state and federal governments to each other and of both these governments to the people; the argument [opposing such a view] has a force that is irresistible, *in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results*

22. *Calder*, 3 U.S. at 388.
23. SULLIVAN & GUNTHER, *supra* note 4, at 452.
24. *Calder*, 3 U.S. at 398-99 (Iredell, J., dissenting).
25. JOHN C. MILLER, ORIGINS OF THE AMERICAN REVOLUTION 216 (Little, Brown and Co. 1943).
26. SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE ENGLISH LAW § II, at 38-40 (Grigg Duyckink Long Collins, Chitty ed., 1827).
27. 2 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH SPEAKING PEOPLES 125 (Dodd, Mead & Co. 1956).
28. Slaughter-House Cases, 83 U.S. 36 (1872).
29. *Slaughter-House*, 83 U.S. at 36.

> *were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them.*[30]

An examination of the plain language of the Fourteenth Amendment supports Justice Miller:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[31]

There is no language contained in this amendment that expresses a purpose of changing the relationship between State and Federal government "too clearly to admit of doubt."[32]

Yet as time passed, law not in the text would be discovered "by appeal from its letter to the spirit."[33] In *Lochner v. New York*,[34] the Court indicated a willingness to move past a literal interpretation of the word "liberty" in the Due Process Clause.[35] The Court held that liberty created a fundamental right to contract, and the state of New York was not allowed to interfere with labor contracts.[36] Justice Holmes' dissenting comment that "The Fourteenth Amendment did not enact Mr. Herbert Spencer's Social Statics"[37] would eventually prevail, and the right to contract is no longer considered fundamental.[38] However, other cases would emerge that applied *Lochner's* broad concept of liberty to other rights that were considered fundamental.[39] In *Skinner v. Oklahoma*,[40] the court invalidated a mandatory sterilization law, holding that the right to procreate was fundamental.[41] In *Meyer v. Nebraska*,[42] the Court expanded on these rights, stating: "[Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to . . . engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according

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30. *Id.* at 78 (emphasis added).
31. U.S. CONST. amend. XIV.
32. *Slaughter-House*, 83 U.S. at 78.
33. WILLS, *supra* note 1, at 38; Lawrence H. Tribe, Lawrence v. Texas*: The Fundamental Right That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1938 (2004); *see generally* SULLIVAN & GUNTHER, *supra* note 4, at 452 (discussing the rise of substantive due process).
34. 198 U.S. 45 (1905).
35. *Lochner*, 198 U.S. at 64; Tribe, *supra* note 33, at 1938.
36. *Id.*; Tribe, *supra* note 33, at 1938.
37. *Id.* at 75 (Holmes, J., dissenting). Mr. Herbert Spencer's Social Statics was an economic treatise advocating a laissez-faire approach that was popular at the turn of the century. *Id.*
38. *See generally* SULLIVAN & GUNTHER, *supra* note 4 (detailing the end of the *Lochner* regime); Tribe, *supra* note 33, at 1938.
39. *See generally* SULLIVAN & GUNTHER, *supra* note 4, at 508-594 (discussing the evolution of the fundamental rights doctrine); Tribe, *supra* note 33, at 1938.
40. 316 U.S. 535 (1942).
41. *Skinner*, 316 U.S. at 541-43.
42. 262 U.S. 390 (1923).

to the dictates of his own conscience . . . ."[43] Justice Goldberg stated the evolving view in his concurring opinion in *Griswold v. Connecticut*:[44] "[T]he concept of liberty protects those personal rights which are fundamental, and is not confined to the specific terms of the Bill of Rights . . . there are additional fundamental rights which exist alongside those . . . specifically mentioned."[45] As this line of jurisprudence developed, the Court would hold that fundamental rights included the right to control one's body[46] and mind,[47] the right to travel,[48] to marry,[49] to vote,[50] and perhaps most controversially, the right to privacy.[51]

In 1973, the Supreme Court decided *Roe v. Wade*,[52] which used this privacy right, "founded in the Fourteenth Amendment's concept of personal liberty," to protect a woman's right to an abortion. Although limited to abortion, "*Roe* has proved to be key to subsequent decisions not limited to reproductive rights."[53] Nineteen years later, the Court expanded on *Roe* in *Planned Parenthood v. Casey*,[54] holding that traditions "afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[55]

In 2003, the Court indicated the broadest protection yet, holding in *Lawrence v. Texas*[56] that a state may not criminalize same-sex sodomy and that the constitutional guarantees of personal liberty and privacy protect "freedom of thought, belief, expression, and certain intimate conduct . . . beyond spatial bounds [of the home]."[57] In dissent, Justice Scalia noted that as a result of the holding, "laws against . . . same-sex marriage . . . [are] called into question."[58] The *Goodridge* plaintiffs agreed.[59]

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43. *Meyer*, 262 U.S. at 399.
44. 381 U.S. 479 (1965).
45. *Griswold*, 381 U.S. at 486-88 (Goldberg, J., concurring).
46. *Skinner*, 316 U.S. at 535.
47. *Meyer*, 262 U.S. at 390.
48. Aptheker v. Secretary of State, 378 U.S. 500, 505 (1964).
49. Loving v. Virginia, 388 U.S. 1, 12 (1967); Zablocki v. Redhail, 434 U.S. 374, 384 (1978).
50. Shaw v. Reno, 509 U.S. 630, 639 (1993).
51. *Griswold*, 381 U.S. at 479; Roe v. Wade, 410 U.S. 113, 153 (1973).
52. *Roe*, 410 U.S. at 113.
53. Brenda Feigen, *Same-Sex Marriage: An Issue of Constitutional Rights Not Moral Opinions*, 27 HARV. WOMEN'S L.J. 345, 345 (2004).
54. 505 U.S. 833 (1992).
55. *Casey*, 505 U.S. at 851.
56. 123 S. Ct. 2472 (2003).
57. *Lawrence*, 539 U.S. at 562.
58. *Id.* at 2490 (Scalia, J., dissenting).
59. *Goodridge*, 798 N.E.2d at 960.

B. The Impact of the Fundamental Rights Doctrine on Legislation

A judicial by-product of the fundamental rights doctrine is the varying standards of review by which the Court reviews legislation.[60] When a fundamental right is present, the Court uses "strict judicial scrutiny"; a law must have a "compelling goal" and be "narrowly tailored" toward that goal.[61] Absent a fundamental right, the Court uses "rational basis" or "minimum rationality" review; a law must only have a "legitimate goal" and be "rationally related" toward that goal.[62] The naming of a standard, "a point somewhere on the spectrum from minimum rationality to per se prohibition in order to signal the appropriate level of judicial deference . . . the legislature should expect,"[63] is a recent addition to the Court's methodology.[64] It is often criticized as being more "conclusory than informative,"[65] leaving commentators to suggest that it "has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis."[66]

Worthy or not, varying levels of judicial scrutiny might be here to stay; sometimes it is harder to put jurisprudential genies back in the bottles whence they came than the more magical kind.[67] Clearly, an entire case can turn on the presence of a fundamental right.[68] *Goodridge* should have.[69]

III. *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*[70]

A sharply divided court issued the opinion.[71] The majority held that there was no rational reason to treat same-sex couples differently than opposite-sex couples.[72] Accordingly, the majority held that Massachusetts could not exclude same-sex partners from receiving marriage licenses.[73] Justice Greaney concurred with the result but wrote separately to indicate that he believed the decision should have been reached by applying a higher level of judicial scrutiny.[74] Justices Spina, Sosman, and

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60. Tribe, *supra* note 33, at 1916; *see generally* Lynn Wardle, *A Critical Analysis of Constitutional Claims for Same Sex Marriage*, 1996 BYU L. REV. 1, 14, 28 (discussing the impact of strict scrutiny).

61. *Goodridge*, 798 N.E.2d at 960, 976.

62. *Id.* at 983.

63. Tribe, *supra* note 33, at 1916.

64. *Id.* at 1916-17.

65. *Id.*

66. *Id.*

67. *See generally id.* (commenting on the merits of varying levels of judicial review).

68. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); *see generally* Wardle, *supra* note 60 (discussing the impact of strict scrutiny).

69. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); *see generally* Wardle, *supra* note 60.

70. 798 N.E.2d 941 (Mass. 2003).

71. *Goodridge*, 798 N.E.2d at 941.

72. *Id.* at 948.

73. *Id.*

74. *Id.* at 970 (Greaney, J., concurring).

Cordy each wrote separate dissents.[75] Justice Spina argued that the court had taken on a legislative role.[76] Justice Sosman suggested that the court had misapplied the minimum rationality standard.[77] Justice Cordy wrote that the opinion ignored the fact that the traditional definition of marriage was "between a man and a woman."[78] Each dissenting justice joined the dissents of the other two.[79]

A. The Majority Opinion: Applying Rational Basis Review

Chief Justice Marshall announced the opinion of the court, which was joined by Justices Ireland and Cowin.[80] The court recognized that legislative intent, along with history and tradition, defined marriage as a "union between a man and woman."[81] Nevertheless, noting the importance of marriage in a community, and the many benefits that flow only to married couples, the court held that to deny same-sex partners a marriage license violated their rights under the Massachusetts Constitution.[82] As Articles 1, 7, 10, and 12 of the Massachusetts Constitution draw language from the Fourteenth Amendment of the United States Constitution, the opinion relied heavily on federal Constitutional case law.[83]

In reaching its conclusion, the court examined the legislative rationales offered by the state: "(1) providing a favorable setting for procreation; (2) ensuring the optimal setting for child rearing, which the department defines as a two-parent family with one parent of each sex; and (3) preserving scarce State and private financial resources."[84] Ultimately, the court found that there was no rational relationship between these goals and the policy of excluding same-sex partners from receiving a marriage license.[85] Therefore, the majority declined to reach the issue of whether

75. *Id.* at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).

76. *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting).

77. *Id.* at 979 (Sosman, J., dissenting).

78. *Id.* at 983 (Cordy, J., dissenting).

79. *Id.* at 983 (Cordy, J., dissenting); *id.* at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting).

80. *Id.* at 948.

81. *Id.* at 952.

82. *Id.* at 968-70.

83. *Id.*

84. *Id.* at 961.

85. *Id.* at 948. Pointing out that the rationality review is not "toothless," *id.* at 960, the court noted:

> If total deference to the Legislature were the case, the judiciary would be stripped of its constitutional authority to decide challenges to statutes pertaining to marriage, child rearing, and family relationships, and, conceivably, unconstitutional laws that provided for the forced sterilization of habitual criminals; prohibited miscegenation; required court approval for the marriage of persons with child support obligations; compelled a pregnant unmarried minor to obtain the consent of both parents before undergoing an abortion; and made sodomy a criminal offense, to name just a few, would stand.

Id. at 966 n.31.

same-sex marriage was a fundamental right demanding strict scrutiny.[86] The decision of the Superior Court was vacated.[87]

B. Justice Greaney's Concurrence: Laws Prohibiting Same-Sex Marriage Should Receive Heightened Scrutiny

Justice Greaney filed a concurring opinion, agreeing with both the outcome and the remedy.[88] However, he suggested that a fundamental rights analysis was the correct approach to the case: "The withholding of relief from the plaintiffs, who wish to marry, and are otherwise eligible to marry, on the ground that the couples are of the same gender, constitutes a categorical restriction of a fundamental right."[89] Accordingly, he advocated the strict scrutiny that accompanies such a right.[90] He further noted that given the fact that marriage is "the cornerstone of our social structure, as well as the defining relationship in our personal lives,"[91] none of the state's rationales for interpreting G.L. c. 207 to exclude same-sex partners were sufficiently compelling to withstand strict scrutiny.[92]

Justice Greaney also argued that interpreting G.L. c. 207 to exclude same-sex partners was an equal protection violation of both the federal and state Constitutions based on sex.[93] He disagreed with those who suggested that there was no gender discrimination at all, pointing out: "Hillary Goodridge cannot marry Julie Goodridge because she (Hillary) is a woman. Likewise, Gary Chalmers cannot marry Richard Linnell because he (Gary) is a man."[94]

C. The Dissents: Courts Should Not Act As A Legislative Body

The dissents attempted to discredit the majority opinion by pointing out its lack of deference to the legislature, the total lack of scientific evidence considered, and the majority's misapplication of the minimum rationality standard.[95] These justices also suggested that there was no right to same-sex marriage, fundamental or not.[96]

Justice Spina dissented on the grounds that the court had usurped the responsibilities of the legislature.[97] He wrote "What is at stake in this

86. *Id.* at 961.
87. *Id.* at 969.
88. *Id.* at 970 (Greaney, J., concurring).
89. *Id.* (Greaney, J., concurring).
90. *Id.* (Greaney, J., concurring).
91. *Id.* at 973 n.5 (Greaney, J., concurring).
92. *Id.* at 972 (Greaney, J., concurring).
93. *Id.* (Greaney, J., concurring).
94. *Id.* at 971 (Greaney, J., concurring).
95. *Id.* at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).
96. *Goodridge*, 798 N.E.2d at 979 (Sosman, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 983 (Cordy, J., dissenting).
97. *Goodridge*, 798 N.E.2d at 975 (Spina, J., dissenting).

case is not the unequal treatment of individuals or whether individual rights have been impermissibly burdened, but the power of the Legislature to effectuate social change without interference from the courts."[98]

Justice Sosman dissented, arguing that the majority had misapplied the rational basis standard.[99] He additionally objected to the lack of attention given to scientific study, noting that "studies to date reveal that there are still some observable differences between children raised by opposite-sex couples and children raised by same-sex couples."[100]

Finally, Justice Cordy dissented on the grounds that the very definition of marriage was "a union between a man and woman," and that when the majority held this to be "merely conclusory," it was a "semantic sleight of hand."[101] While acknowledging that a classification based on sex should receive heightened review, he disagreed with Justice Greaney that this was such a case, based on the idea that people of neither sex were prohibited from marrying a person of the opposite sex.[102]

IV. ANALYSIS

This analysis suggests that the *Goodridge v. Department of Public Health* court did not address the true issue presented by the case, which is whether laws prohibiting same-sex marriage should receive the strict judicial scrutiny that accompanies a fundamental right.[103] Section (A) explains why the court was incorrect when it chose the rational basis standard of review.[104] Section (B) maintains that this standard was incorrectly applied.[105] Section (C) argues that same-sex marriage should be analyzed as a fundamental right,[106] by demonstrating that the true tradition at issue is the fundamental right of controlling "choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."[107] Section (D) concludes by applying the strict scrutiny that would accompany such a right.

A. Choosing Rational Basis Review

By choosing rational basis review, the *Goodridge* court used the wrong standard.[108] In *Skinner v. Oklahoma*,[109] the United States Supreme

98. *Id.* at 974 (Spina, J., dissenting).
99. *Id.* at 979 (Sosman, J., dissenting).
100. *Id.* (Sosman, J., dissenting).
101. *Id.* at 984 (Cordy, J., dissenting).
102. *Id.* (Cordy, J., dissenting).
103. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring).
104. *Goodridge*, 798 N.E. 2d at 970 (Greaney, J., concurring).
105. *Id.* at 978 (Sosman, J., dissenting).
106. Tribe, *supra* note 33, at 1945.
107. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).
108. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring); *id.* at 983 (Cordy, J., dissenting); *id.* at 976 (Spina, J., dissenting); *see* Karen Loewy, *The Unconstitutionality Of Excluding Same-Sex Couples From Marriage*, 38 NEW ENG. L. REV. 555, 560-61 (2004).

Court held that "Marriage is one of the basic civil rights of man, fundamental to our very existence and survival."[110] The Court confirmed in *Loving v. Virginia*[111] that marriage is a fundamental right, "one of the vital personal rights essential to the orderly pursuit of happiness."[112] And in *Zablocki v. Redhail*,[113] the Court held that marriage is "part of the 'fundamental right of privacy' implicit in the Fourteenth Amendment's Due Process Clause."[114] Yet the *Goodridge* court held that because "no fundamental right or 'suspect' class is at issue here . . . rational basis is the appropriate standard of review."[115] Despite citing language that confirms that marriage is a fundamental right, it proceeded to hold: "The right to marry is different from rights deemed fundamental for equal protection and due process purposes . . . ."[116] If the court is referring to traditional marriage, this is an incorrect statement of the law.[117] If the court is referring to same-sex marriage, it is undermining the legal foundation of its conclusion.[118] The opinion is replete with language, and rests on the principle, that same-sex partners applying for marriage licenses should be treated no differently than opposite-sex partners.[119] *Loving*, *Zablocki* and *Skinner* dictate that laws restricting opposite-sex marriage receive strict scrutiny.[120]

Certainly, state law may provide greater protection to its citizens than does the federal Constitution.[121] The *Goodridge* court noted that "Fundamental to the vigor of our Federal system of government is that 'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'"[122] However, a state may not provide less protection than the federal Constitution mandates.[123] In other words, federal cases "set the floor . . . but not the ceiling."[124] Since the court held that same-sex and opposite-sex couples should be treated the same, it was bound by federalism to apply strict scrutiny.[125]

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109. 316 U.S. 535 (1942).
110. Loving v. Virginia, 388 U.S. 1, 12 (1967) (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)) (internal citations omitted).
111. 388 U.S. 1 (1967).
112. *Loving*, 388 U.S. at 12.
113. 434 U.S. 374 (1978).
114. *Goodridge*, 798 N.E.2d at 957 (citing Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).
115. *Id.* at 961.
116. *Id.* at 957.
117. Zablocki v. Redhail, 434 U.S. 374, 386 (1978); *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).
118. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring); *id.* at 983 (Cordy, J, dissenting).
119. *Goodridge*, 798 N.E.2d at 948.
120. *Loving*, 388 U.S. 1 (1967); *Skinner*, 316 U.S. 535 (1942); *Zablocki*, 434 U.S. 374 (1978).
121. Arizona v. Evans, 514 U.S. 1, 30 (1995).
122. *Goodridge*, 798 N.E.2d 941 (citing *Arizona v. Evans*, 514 U.S. at 7).
123. Loewy, *supra* note 108, at 556.
124. *Id.* at 558.
125. *Goodridge*, 798 N.E.2d at 972 (Greaney, J., concurring).

The *Goodridge* court concluded that Massachusetts' ban did not survive rational basis review for either due process or equal protection.[126] Accordingly, the court did not consider plaintiffs' arguments that the case merited strict judicial scrutiny.[127] Undoubtedly, if a law fails rational basis review, *a fortiori* it fails strict scrutiny.[128] If G.L. c. 207 truly failed rational basis review, the choice of the wrong standard would be irrelevant.[129] However, as demonstrated below, G.L. c. 207 should in fact withstand rational basis review, leaving the question of whether it would survive strict scrutiny unanswered.[130]

B. Applying Rational Basis Review

The court asked the wrong question when it applied the rational basis test.[131] The real question under that test is not whether excluding same-sex marriages *will* achieve the goals set forth by the state, but whether it *might*.[132] While it is true that the rational basis test is "not toothless,"[133] it is the lowest standard of judicial review; a statute will survive if it addresses a legitimate state goal, and a rational legislator could think that the statute might advance the goal.[134]

Since "[t]he rational basis standard applied under the Massachusetts Constitution and the Fourteenth Amendment to the United States Constitution is the same," federal case law illustrates the point well.[135] In *Williamson v. Lee Optical*,[136] Justice Douglas confirmed that the mere theoretical possibility that a law would advance a goal was sufficient to withstand rational basis review.[137] He wrote:

> The legislature might have concluded that the frequency of occasions when a prescription is necessary was sufficient to justify this regulation . . . . The legislature might have concluded that one was needed often enough to require one in every case. Or the legislature may have concluded that eye examinations were so critical . . . that every change should be accompanied by a prescription from a medical ex-

126. *Id.* at 941.
127. *Id.* at 961.
128. *Id.* at 972 (Greaney, J., concurring).
129. *Id.* (Greaney, J., concurring).
130. *Id.* (Greaney, J., concurring).
131. *Goodridge*, 798 N.E. 2d at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 972 (Greaney, J., concurring).
132. *Goodridge*, 798 N.E. 2d at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 972 (Greaney, J., concurring).
133. *Goodridge*, 798 N.E. 2d at 960.
134. Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955); *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 975 (Spina, J., dissenting); *id.* at 972 (Greaney, J., concurring).
135. *Goodridge*, 798 N.E. 2d at 983 (Cordy, J., dissenting).
136. 348 U.S. 483 (1955).
137. *Williamson*, 348 U.S. at 487.

> pert. *The law need not be in every respect logically consistent with its aims to be constitutional.*[138]

The first legislative rationale in *Goodridge* is that marriage provides a "favorable setting for procreation."[139] The majority held that it failed minimum rationality because "[t]he consummation of a marriage by coition is not necessary to its validity," and "impotency does not render a marriage void, but only voidable at the suit of the party conceiving himself or herself to be wronged."[140] This argument misses the point.[141] Just because some married people may not have children does not mean that marriage is not a "favorable setting for procreation."[142] If it *might* be such a setting, G.L. c. 207 survives rational basis review.[143]

The second legislative rationale is "ensuring the optimal setting for child rearing."[144] The court simply stated: "The 'best interests of the child standard' does not turn on a parent's sexual orientation or marital status."[145] Yet, as noted in Justice Sosman's dissent, for several thousand years, there has been a popular opinion that living in a home with a mother and father is in fact the optimal setting for a child.[146] This does not mean that this belief is necessarily true, but it does mean that it would not be irrational for a legislator to think that it is true.[147] That is all that the standard requires.[148]

The third legislative rationale is "preserving scarce State and private financial resources."[149] The court's contention that "an absolute statutory ban on same-sex marriage bears no rational relationship to the goal of economy"[150] is somewhat undermined by the extensive list of state benefits that are denied single people:

> [J]oint Massachusetts income tax filing; entitlement to wages owed to a deceased employee [public employees]; preferential options under the Commonwealth's pension system; preferential benefits in the Commonwealth's medical program; access to veterans' spousal benefits and preferences; financial protections for spouses of certain

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138. *Id.* (emphasis added).
139. *Goodridge*, 798 N.E.2d at 961; Loewy, *supra* note 108, at 559.
140. *Goodridge*, 798 N.E.2d at 961 (citing Franklin v. Franklin, 28 N.E. 681 (Mass. 1891) and Martin v. Otis, 124 N.E. 294 (Mass. 1919)); Loewy, *supra* note 108, at 559.
141. Loewy, *supra* note 108, at 559.
142. *Goodridge*, 798 N.E.2d at 961.
143. *Id.* at 978 (Sosman, J., dissenting); *id.* at 983 (Cordy, J., dissenting); *id.* at 972 (Greaney, J., concurring); Loewy, *supra* note 108, at 559.
144. *Goodridge*, 798 N.E.2d at 961.
145. *Id.* at 963.
146. *Id.* at 979 (Sosman, J., dissenting); *id.* at 996 (Cordy, J., dissenting); William C. Duncan, *The State Interests In Marriage*, 2 AVE MARIA L. REV. 153, 158 (2004).
147. *Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting); *see* Duncan, *supra* note 146, at 157.
148. *Goodridge*, 798 N.E.2d at 1000 (Cordy, J., dissenting).
149. *Id.* at 961.
150. *Id.* at 964.

> Commonwealth employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty).[151]

It is arguably bad, mean-spirited policy to save money by denying certain people the right to marry, but it is not irrational to think that it *will* save money.[152]

C. Considering Fundamental Rights

1. In Search of Tradition

The true issue of this case is the question the *Goodridge* court left unanswered: whether marriage is a fundamental right for same-sex as well as opposite-sex couples.[153] A right is considered fundamental if it is "deeply rooted in this Nation's history and tradition."[154] Discerning such tradition is a treacherous endeavor.[155] In the history of marriage, many practices have been sustained over long periods of time, later to be rejected as wrong.[156] Although the practices became traditions, they have no place in a fundamental rights analysis.[157]

The ancient common law Right of Coverture stated that a husband had the sole right to control his wife's real property, and that he was the true owner of his wife's personal property.[158] For centuries, a wife could not sue her husband based on the common law idea that "a husband and wife are one, and he is the one."[159] The *Goodridge* court noted the traditional inequity between husband and wife:

> Thus, one early Nineteenth Century jurist could observe matter of factly that, prior to the abolition of slavery in Massachusetts, 'the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father. He is obliged to maintain them, and they cannot be separated from him.'[160]

John Winthrop confirmed this view, stating a "husband is [a wife's] lord, and she is to be subject to him . . . a true wife would not think her condition safe and free but in her subjection to her husband's author-

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151. *Id.* at 955; Loewy, *supra* note 108, at 559.

152. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 972 (Greaney, J., concurring).

153. *Id.* at 972 (Greaney, J., concurring).

154. Moore v. East Cleveland, 431 U.S. 494, 503 (1977).

155. Tribe, *supra* note 33, at 1937; *see generally* Mark Strasser, *Sodomy, Adultery and Same-sex Marriage: On Legal Analysis and Fundamental Rights*, 8 UCLA WOMEN'S L.J. 313 (1998) (discussing traditions in relation to a fundamental rights analysis).

156. *Goodridge*, 798 N.E.2d at 968; *see generally* Strasser, *supra* note 155.

157. *See generally* Strasser, *supra* note 155.

158. *Goodridge*, 798 N.E.2d at 968.

159. Chief Justice Joseph R. Greenhill, Remarks at the memorial service for Justice James P. Hart, Texas Supreme Court (Apr. 25, 1988) (commenting on Worden v. Worden, 224 S.W.2d 187 (Tex. 1949)); *see also Goodridge*, 798 N.E.2d at 968.

160. *Goodridge* 798 N.E.2d at 967 (citing Winchendon v. Hatfield, 4 Mass. 123, 129 (1808)).

ity."[161] The law did not allow interracial marriage in many states before *Loving*.[162] Yet in 1780 the law allowed future Chief Justice John Marshall to marry 14-year-old Mary Ambler.[163]

Each of the unfortunate practices above has been "deeply rooted in this Nation's history,"[164] but is not a fundamental right.[165] Perhaps the most distilled expression of the folly of blindly relying on tradition was observed by Oliver Wendell Holmes in 1897: "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV."[166]

If the task of weeding out practices not properly part of a search for fundamental rights is difficult, harder yet is the task of conceiving the whole of what is left; to avoid seeing the "dots but not the path that passes through them."[167] Various members of the Court have insisted on the dots only, finding a fundamental right by determining which "activities belong to the historically venerated catalog of privileged acts and which do not."[168] In *Washington v. Glucksberg*,[169] Justice Rehnquist wrote that a fundamental right existed only if it could be found in a "careful description" of "concrete example[s]" throughout history.[170] In *Michael H. v. Gerald D.*,[171] Justice Scalia stated that "we refer to the most specific level at which a[n] . . . asserted right can be identified. General traditions provide imprecise guidance . . . [and] a rule of law that binds neither by text nor any particular, identifiable tradition, is no rule of law at all."[172]

Many voices fall into this trap over same-sex marriage; they search in vain for a specific tradition of same-sex marriage, missing the true tradition that is right in front of them.[173] Dissenting in *Lawrence v. Texas*, in which he noted that the door to same-sex marriage was now open, Justice Scalia observed that surely a thing that was once criminal cannot be considered a fundamental right:

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161. JOHN WINTHROP, THE HISTORY OF NEW ENGLAND FROM 1630-1649 228-30 (Boston: Little, Brown and Co. 1853).

162. 388 U.S. 1 (1967).

163. 1 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 151 (Houghton Mifflin Co. 1916).

164. *Moore*, 431 U.S. at 503; *Goodridge*, 798 N.E.2d at 990 (Cordy, J., dissenting).

165. *Goodridge*, 798 N.E.2d at 991 (Cordy, J., dissenting); *see generally* Strasser, *supra* note 155 (discussing traditions in relation to a fundamental rights analysis).

166. Greg Bailey, *Blackstone in America: Lectures by an English Lawyer Become a Blueprint for a New Nation's Laws and Leaders*, The Early American Review, *at* http://earlyamerica.com/review/spring97/blackstone.html (March 8, 2005).

167. Tribe, *supra* note 33, at 1936-37.

168. Tribe, *supra* note 33, at 1924.

169. 521 U.S. 702 (1997).

170. *Glucksberg*, 521 U.S. at 722-23; *see also* Tribe, *supra* note 33, at 1924.

171. 491 U.S. 110 (1989).

172. *Michael H.*, 491 U.S. at 127.

173. Tribe, *supra* note 33, at 1937.

> Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. Against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.[174]

This misses the rather obvious point that in 1868, it was also illegal for whites and African-Americans to marry, illegal for women to vote, and for all but three years of the nation's history, African-Americans were property.[175] Each of these examples today would violate a fundamental right.[176] Dissenting in *Goodridge*, Justice Spina followed the example of Justice Scalia: "Same-sex marriage is not 'deeply rooted in this Nation's history,' . . . same-sex marriage is not a right, fundamental or otherwise, recognized in this country."[177] Finding same-sex marriage absent from the history books, Justices Spina and Scalia declared it not a part of our tradition.[178]

Sir William Blackstone taught that a judge reveals, rather than makes the law.[179] In revealing a tradition, it is more important to consider the principles that emerge, rather than the combination of facts of individual cases.[180] To view traditions as a list of specific acts is to endanger "not just . . . substantive due process but also . . . the nature of liberty itself."[181] Justice Harlan noted this truth in his concurrence in *Griswold v. Connecticut*:[182] "[T]radition is a living thing. The full scope of liberty . . . cannot be found in or limited by the precise terms of specific guarantees . . . . Liberty is not a set of isolated points . . . but a rational continuum."[183] Lawrence Tribe provides the example that "[i]f the liberty

174. Lawrence v. Texas, 539 U.S. 558, 596 (2003) (citing Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986)).

175. *Goodridge*, 798 N.E.2d at 958, 967; John G. Culhane, *Uprooting The Arguments Against Same Sex Marriage*, 20 CARDOZO L. REV. 1119, 1165 (1999); Strasser, *supra* note 155, at 319 (discussing Justice Scalia's test for a fundamental rights analysis).

176. *See Goodridge*, 798 N.E.2d at 990 (Cordy, J., dissenting); Culhane, *supra* note 175, at 1165; Strasser, *supra* note 155, at 319; *Lawrence*, 539 U.S. 558 (2003).

177. *Goodridge*, 798 N.E.2d at 976 (Spina, J., dissenting).

178. *Id.* (Spina, J., dissenting); *Lawrence*, 539 U.S. at 596; *see generally* Tribe, *supra* note 33 (arguing against viewing fundamental rights as a set of specific acts).

179. BLACKSTONE, *supra* note 26, § II, at 38-40.

180. *See* Tribe, *supra* note 33, at 1937. The article offers a detailed discussion of the importance of seeing the principles that connect the cases rather than facts that make up the individual cases. *Id.*

181. Tribe, *supra* note 33, at 1923.

182. 381 U.S. 479 (1965).

183. *Griswold*, 381 U.S. at 479.

claimed by the dying patients in *Glucksberg*[184] could be flattened into an ostensible 'right' to an overdose of some barbiturate, then the claim in the flag-burning cases . . . could be flattened into a putative right to set fire to a painted cloth."[185] Reduced to its basic facts, a fundamental right can be read out of any act.[186]

Each case that supports the plaintiffs in *Goodridge* can be distinguished.[187] *Meyer v. Nebraska* was about education,[188] and *Skinner* dealt with sterilization.[189] *Griswold* was about contraception,[190] and *Roe v. Wade* about abortion.[191] *Zablocki*[192] and *Loving*[193] concerned the right to marry, not redefining it.[194] *Lawrence* was a case about private acts, not a demand for a government issued license.[195]

But the principle that unifies these precedents is the true tradition at issue; the inherent right of people to control "choices central to personal dignity and autonomy."[196] This idea is stated ably by Justice O'Connor in *Planned Parenthood v. Casey*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[197]

Goodridge is "no more a case about a fundamental right" to same-sex marriage than *Loving* "was a case about a fundamental right" to interracial marriage, or *Bowers* "was a case about a 'fundamental right to sodomy.'"[198] Laws restricting same-sex marriage deserve to be held to strict judicial scrutiny, because they implicate the fundamental right of

184. *Glucksberg*, 521 U.S. at 702 (holding that Washington's prohibition against assisted suicide does not offend the Fourteenth Amendment).
185. Tribe, *supra* note 33, at 1923-24.
186. *Id.*
187. *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
188. Meyer v. Nebraska, 262 U.S. 390 (1923).
189. *Skinner*, 316 U.S. at 535.
190. 381 U.S. 479 (1965); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
191. 410 U.S. 113 (1973); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
192. 434 U.S. 374 (1978); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
193. 388 U.S. 1 (1967); *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
194. *Loving*, 388 U.S. at 1; *Goodridge*, 798 N.E.2d at 985 (Cordy, J., dissenting).
195. 539 U.S. 558 (2003); *Goodridge*, 798 N.E.2d at 986 (Cordy, J., dissenting).
196. *Casey*, 505 U.S. at 851.
197. *Id.*
198. Wardle, *supra* note 60, at 43 (quoting Bowers v. Hardwick, 478 U.S. 186 at 192-94 (1986)); *see generally* Tribe, *supra* note 33 (arguing against viewing fundamental rights as a set of specific acts).

controlling "choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment."[199]

2. The Traditions from which America Broke

The right to define one's own concept of life, free from the compulsion of the state, is not only "deeply rooted in this nation's history and tradition."[200] It is the defining characteristic of the American experience.[201] This becomes evident when one examines "the traditions from which [America] developed as well as the traditions from which it broke."[202] Neither tradition can be understood without the presence of the other.[203] The European tradition from which the American settlers broke used the compulsion of a person's identity as an organizing principle.[204] This principle was so pervasive that it could be found in the religious, intellectual, social and economic realities of Seventeenth Century European life.[205] In every way, people's identities were dictated to them the moment they were born.[206]

a. Religious and Intellectual Compulsion

The right to control one's identity by way of religious and intellectual freedom was not granted to Seventeenth Century Europeans.[207] In England, James I and Charles I carried on the persecution of Catholics that had started the moment Henry VIII withdrew from the church.[208] The Test Act provided that no Catholic could hold office.[209] James I had Unitarians burned alive for doubting the divinity of Christ.[210] William Prynne had his ears cut off for publishing *Histriomatrix*, a series of blasphemous plays.[211] Jews had not been allowed in the country since the time of Edward I.[212] After the ascension of Oliver Cromwell in 1642, the control of the Puritans substituted itself for the control of the Church of England.[213] Gambling and betting were outlawed, and adultery was pun-

199. *Casey*, 505 U.S. at 851; Tribe, *supra* note 33, at 1951.
200. *Moore*, 431 U.S. at 503.
201. *Id.* at 503-04.
202. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
203. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).
204. *See generally* WILL & ARIEL DURANT, THE AGE OF REASON (Simon & Schuster 1961) [hereinafter DURANT I] (offering an in depth analysis of the relationship between government policies and private life in seventeenth century Europe).
205. *Id.*
206. *Id.*
207. CHURCHILL, *supra* note 27, at 150-51.
208. *Id.* at 151-52.
209. WILL & ARIEL DURANT, THE AGE OF LOUIS XIV 291 (Simon & Schuster 1963) [hereinafter DURANT II].
210. DURANT I, *supra* note 204, at 140.
211. *Id.* at 193.
212. CHURCHILL, *supra* note 27, at 315.
213. *Id.* at 312.

ishable by death.[214] Drinking, swearing, walking on the Sabbath, and athletic sports were also banned.[215]

If things improved under William and the Glorious Revolution of 1688, it was not as much as is popularly believed.[216] The Toleration Act was passed in 1689, but tolerance did not extend to Catholics, Unitarians, Jews, and Pagans.[217] Dissenters were not allowed to attend university and could not seek elective office.[218] In 1697, the strengthened legislature passed a law against blasphemy mandating prison for criticism of the church.[219] In 1699, laws were passed imposing life imprisonment for saying mass, and rewards were waiting for those who turned in violators.[220] A person not taking a loyalty oath to the Church of England lost the right to purchase or devise land.[221] Even Locke's *Epistola de Tolerantia*, urging tolerance as a principle, excluded atheists, Moslems, Catholics and Unitarians.[222] On the continent, the same situation existed.[223] Jews had been expelled from Spain and Portugal,[224] the Huguenots compelled to leave France, and the Pietists unwelcome in Germany.[225]

If a person were fortunate enough to find a secular government that would tolerate dissent, the church, which often acted as a sacred government, may not have been so understanding.[226] The parents of the philosopher Spinoza, expelled from Spain and Portugal, found refuge in Holland.[227] Spinoza's heretical beliefs were tolerated by the Dutch government.[228] Yet that which the government allowed, the church elders would not; Spinoza was expelled from the synagogue for his beliefs.[229] Other churches were equally intolerant. On February 26, 1616, Galileo was forced to appear before Urban VIII to recant his Copernican theories published in *De Revolutionibus Orbium Coelestium*.[230] Feeling that the connection between his head and body was but tenuous, he spoke the words: "With a sincere heart and unfeigned faith I abjure, curse, and detest the said errors and heresies . . . ."[231] The idea of defining one's con-

214. *Id.* at 311-12.
215. *Id.*
216. DURANT II, *supra* note 209, at 301-02.
217. *Id.* at 301, 589.
218. *Id.* at 301-02.
219. *Id.* at 302.
220. *Id.*
221. *Id.*
222. *Id.* at 589-90.
223. LOUIS M. HACKER, THE SHAPING OF THE AMERICAN TRADITION 17 (Columbia University Press 1947).
224. WILL DURANT, THE STORY OF PHILOSOPHY 162 (Simon & Schuster 1926) [hereinafter DURANT III].
225. HACKER, *supra* note 223, at 17.
226. *See* DURANT III, *supra* note 224 at 167 (recounting the excommunication of Spinoza).
227. *Id.* at 162.
228. *Id.* at 167.
229. *Id.*
230. DURANT I, *supra* note 204, at 607-08.
231. *Id.* at 610.

cept of life free from government compulsion must have seemed very far away.

b. Economic Compulsion

Economic life offered no greater freedom.[232] The economic world into which people were born was the world where they lived and died, and where their children lived and died.[233] In England, wages were stagnant by law, fixed since 1585 by the Statute of Apprentices.[234] The wages averaged around one shilling a day, yet life's essentials were as expensive in 1685 as they would be 200 years later.[235] Any attempt to increase pay would result in harsh penalties for employers and employees alike.[236] Not only how much a person was paid, but also who worked, was dictated by government policy; the freedom to make employment decisions was restricted by the Statute of Laborers.[237]

The situation elsewhere in Europe was no better.[238] In France, remnants of the feudal system remained as late as the mid-18th Century.[239] As little as two percent of landowners outside of the noble class or the church owned land *franc-alleu*, or "free from feudal dues."[240] Up to one million people were still bound in literal serfdom.[241] These peasants were "*adscripti glebae* (bound to the soil)."[242] They had no legal rights to devise or sell land—one of the primary ways of building wealth for a family over generations.[243] So onerous were the taxes owed that survival was lucky; improvement was impossible.[244] These "legal, feudal and guild hindrances" controlled people's economic identities.[245] Will Durant notes that "It was in this clamor of entrepreneurs to be freed from legal and moral restraints that the modern ideology of liberty began."[246]

232. DURANT II, *supra* note 209, at 257-58.
233. *Id.* at 258.
234. *Id.* at 257-58.
235. *Id.* at 258.
236. *Id.* at 257-58.
237. WILLIAM HARLAN HALE, THE MARCH OF FREEDOM 37 (Harper & Brothers 1947).
238. WILL & ARIEL DURANT, THE AGE OF VOLTAIRE 259 (Simon & Schuster 1965) [hereinafter DURANT IV].
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 259-60.
245. DURANT II, *supra* note 209, at 258.
246. *Id.*

c. Social Compulsion

The ability to shape one's identity by social class was equally limited.[247] The family into which a person was born defined his social class for life.[248] Regardless of how much talent a person might possess, or how hard a person might work, a lower class crib meant a lower class coffin. In addition, such accidents of birth were determinative in the professional options open to a person.[249] Access to office was determined not by talent, but according to the identity of one's parents.[250] James VI of Scotland had nothing more to recommend him as Elizabeth's successor than bloodline.[251] The House of Lords was (and is) equally blind to merit. Even faculty appointments at universities were determined by parentage.[252] At the anatomical division of the University of Edinburgh, the hereditary reign of the Monro dynasty lasted 126 years.[253] No one who had a different name needed to apply.[254] Inevitably, talent was dissipated over subsequent generations, and it was noted that in comparison to Professors Monro *primus* and *secondus*, Professor Monro *tertius* was "also, but not likewise."[255]

3. The Tradition from which America Developed

From all this the settlers fled.[256] The specific reasons were different, covering the spectrum from religious to economic, from social to political, but in common was the freedom they sought to define their lives free from government compulsion.[257] In almost every way, the old world had said 'this is who you are;' the new world would allow people to say 'this is who I am.'[258]

a. Legal Foundations

The natural law theories of John Locke provided an intellectual and legal framework.[259] Although Locke's *Two Treatises on Government*[260] had been intended as a defense of the Glorious Revolution of 1688, generations of settlers drew on his ideas freely.[261] In this view of the world,

247. *See generally* CHURCHILL, *supra* note 27 (providing a detailed discussion of English society and history).
248. *Id.*
249. *Id.*
250. *Id.*
251. *Id.*
252. WILLIAM ROUGHEAD, NOTABLE BRITISH TRIALS 3 (The John Day Co. 1927).
253. *Id.*
254. *Id.*
255. *Id.*
256. DURANT I, *supra* note 204, at 158.
257. *Id.*
258. *See generally* DAVID MCCULLOUGH, JOHN ADAMS (2001) (discussing the attitudes of colonial Americans).
259. MILLER, *supra* note 25, at 170.
260. JOHN LOCKE, TWO TREATISES ON GOVERNMENT (George Routledge & Sons 1884).
261. MILLER, *supra* note 25, at 170.

"there was a state of nature in which men enjoyed complete liberty."[262] Government existed only to ensure that people be free to control their own lives.[263] Created by "God and Nature," these natural freedoms of mankind to control his own life could not be restricted by governments.[264] These ideas drew heavily from the philosophy of Coke and Blackstone, which later supplied authority for Justice Chase in *Calder v. Bull*.[265] Upon this solid footing, the unifying principle of the colonies was that people had a natural right to make decisions defining their lives free from government compulsion.[266]

That the ideas of Locke, Coke and Blackstone are in fact "deeply rooted in this Nation's history" is further evidenced by an examination of political rhetoric over the years. Locke's ideas on the limited nature of government were echoed by Charles Pinckney, who believed that government existed to ensure that citizens received the "blessings of civil and religious liberty" that were their due.[267] The notion of pre-existing law espoused by Blackstone and Coke was confirmed by notable voices at the Constitutional Convention.[268] Thomas Jefferson wrote: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."[269] George Mason suggested that "all men are born equally free and independent, and have certain inherent natural rights . . . among which are the enjoyment of life and liberty."[270] Pennsylvania delegate James Wilson agreed that "All men are, by nature equal and free . . . ."[271] One hundred and eighty five years later, John F. Kennedy confirmed that "[T]he rights of man come not from the generosity of the state, but from the hand of God."[272] Within this framework, the American nation evolved.

b. Religious and Intellectual Freedom

One manifestation of the idea that people were free to define their own concept of life free from the compulsion of the state was that colonial Americans were free to form their own religious identity without government compulsion.[273] To be sure, it was not an instant success; the settlers brought strains of the virus with the antidote.[274] The Puritans of

262. *Id.*
263. *Id.* at 170-71.
264. *Id.* at 171.
265. 3 U.S. 386 (1798).
266. MILLER, *supra* note 25, at 171.
267. PAGE SMITH, THE SHAPING OF AMERICA 78 (1980).
268. MCCULLOUGH, *supra* note 258, at 121.
269. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
270. MCCULLOUGH, *supra* note 258, at 121.
271. *Id.*
272. President John F. Kennedy, Inaugural Address (Jan. 20, 1961).
273. WINSTON CHURCHILL, THE GREAT REPUBLIC 31-32 (Random House 1956).
274. *Id.* at 31.

Massachusetts were as oppressive as their English counterparts.[275] The Salem witch trials were onerous by European medieval standards. Baptists were persecuted in Virginia and North Carolina.[276] But the historical line that culminated in the separation of church and state and freedom of speech reached back to 1636, when Roger Williams set up the colony of Rhode Island.[277] Winston Churchill notes that Rhode Island was "the only centre at that time in the world where there was complete religious toleration."[278] This historical path traveled through Jefferson's *Virginia Statute of Religious Liberty*, stating in part:

> Be it enacted by the general assembly, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess . . . their opinion in matters of religion . . . .[279]

This historical trend culminated in the First Amendment, ensuring freedom of both religion and speech.[280] People would be free to hold and express sacred and secular views free from government compulsion.[281]

c. Social Freedoms

A second manifestation of the idea that people should define their own concept of life free from the compulsion of the state was that colonial Americans were free from the hereditary constraints of Europe.[282] The idea that a person's social identity was formed, and professional identity limited, at the moment of birth was anathema to the idea of America.[283] Jefferson believed in a "natural aristocracy" based on "merit and talent" rather than a hereditary one based on "connections and influence."[284] John Adams used the phrase "natural aristocracy" in a similar way in his *Defence of the Constitutions*.[285] The founders believed these ideas so strongly that Article I of the Constitution forbids citizens from receiving titles of nobility.[286] Even the title by which the President would be addressed received close attention; most members thought it impor-

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275. *Id.*
276. MILLER, *supra* note 25, at 194.
277. CHURCHILL, *supra* note 273, at 31-32.
278. *Id.* at 32.
279. HACKER, *supra* note 223, at 218.
280. U.S. CONST. amend. I.
281. *Id.*
282. Isaac Kramnik, *Introduction to* THE FEDERALIST PAPERS 21 (Isaac Kramnik ed., Penguin Books 1987).
283. *Id.* at 21-22.
284. *Id.* at 21.
285. MCCULLOUGH, *supra* note 258, at 406 (discussing JOHN ADAMS, DEFENCE OF THE CONSTITUTIONS (Boston Pub. 1788)).
286. U.S. CONST. art. I, § 9, cl. 8.

tant to remove any notion of royalty.[287] In 1784, John Adams attended a production of *The Marriage of Figaro* at the Comedie-Francaise in Paris.[288] Adams undoubtedly appreciated Figaro's outburst in act V: "Because you are a great noble, you think you are a great genius! Nobility, a fortune, a rank, appointments to office: all this makes a man so proud! What did you do to earn all this? You took the trouble to get born—nothing more."[289] Figaro spoke for the new nation.[290] So did Senator John Edwards 220 years later, accepting the vice presidential nomination: "[In America,] the family you're born into won't control your destiny."[291] People would be able to define themselves free from the hereditary social compulsions of the old world.[292]

d. Constitutional Protections

The manifestation that most clearly establishes that making choices free from government compulsion is a tradition deeply rooted in the nation's history is the form of government the new nation chose.[293] The framers formed a government in which power was highly diffused in order to ensure against incursion of these rights.[294] In Federalist 51, James Madison wrote about the "double security"[295] of having "vertical separation of powers between the nation and the states, along with the horizontal separation of powers between the federal branches."[296] Attempts by one branch to invade the natural rights of people would be checked by another.[297] Restraints on the federal government were found in the fact that it would have only those powers that were specifically granted.[298] Amendment IX stated that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[299]Amendment X stated that all powers that were not mentioned were reserved for the people.[300] Amendments I through IV placed specific prohibitions on federal action.[301] It is noteworthy that the

287. MCCULLOUGH, *supra* note 258, at 406. It is amusing to remember that when John Adams suggested that the title of 'His Majesty the President,' Ralph Izard suggested the title of 'His Rotundity' would be an appropriate sobriquet for Adams. *Id.*

288. MCCULLOUGH, *supra* note 258, at 307.

289. *Id.*

290. *Id.*

291. Senator John Edwards, Address at the Democratic Convention, July 2004 (transcript available from the Kerry/Edwards campaign).

292. Kramnik, *supra* note 282, at 21.

293. *See generally* SULLIVAN & GUNTHER, *supra* note 4 (offering an overview of the structures of American government).

294. *Id.* at 85.

295. *Id.* at 85 (citing JAMES MADISON, FEDERALIST 51).

296. *Id.*

297. *Id.*

298. *Id.*

299. U.S. CONST. amend. IX.

300. U.S. CONST. amend. X.

301. U.S. CONST. amend. I-IV.

framers rejected a general grant of power as proposed (ironically) by the Virginia delegation, reading:

> That the national legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases, to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by exercise of individual legislation.[302]

Such a grant would be too easy to stretch, and the framers wanted the limits clear.[303]

Although states were given plenary powers, specific limits on state power were found in Article I, section 10.[304] States would be barred from "entering into treaties, coining money, granting titles of nobility, passing bills of attainder, ex post facto laws, laws impairing contracts."[305] States would need congressional approval in order to "impose custom duties, enter interstate compacts, or engage in war."[306] In addition, federalism principles imposed other limits on state action, such as the dormant commerce clause.[307]

To be sure, there were heated differences in the framers' visions.[308] James Madison and Alexander Hamilton had famous disagreements on the strength of the federal government. Thomas Jefferson felt that the security of people's rights lay in reserving power in the hands of the populace.[309] Alexander Hamilton had less confidence in the populace, and felt that protection of people's rights lay in guarding against the "twin specters of despotism and anarchy."[310] Yet when compared with the world of George III and Urban VIII, these differences seem to be of degree rather than of kind.

In addition, the arguments were about means, not ends.[311] Jefferson felt that preserving liberties rested in a strong legislature.[312] Adams wrote "*people's rights and liberties* . . . can never be preserved without a strong executive. If the executive power, or any considerable part of it, is left in the hands of an aristocratical or democratical assembly, it will corrupt the legislature . . . and when the legislature is corrupted, *people are un-*

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302. SULLIVAN & GUNTHER, *supra* note 4, at 97.
303. *Id.*
304. *Id.* at 86.
305. *Id.*
306. *Id.*
307. *Id.* at 233.
308. *Id.* at 85.
309. *See generally* DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN (Little, Brown & Co. 1951) (discussing Jefferson's views on liberty).
310. RON CHERNOW, ALEXANDER HAMILTON 33 (The Penguin Press 2004).
311. MCCULLOUGH, *supra* note 258, at 375.
312. *See generally* MALONE, *supra* note 309 (discussing Jefferson's views on liberty).

done."[313] (emphasis added.) Yet both were concerned about protecting people's liberties. The common goal of the framers was ensuring the inherent right of people to make decisions that "define one's own concept of existence"[314] free from government compulsion.[315]

It is, of course, too simple to write that the Old World was bad and the New World was good.[316] The realities of European life that caused the settlers to leave also gave rise to reform in Europe.[317] The Age of Enlightenment crossed the Atlantic; it is perhaps no coincidence that Jefferson, Franklin, Voltaire and Mozart were contemporaries.[318] In addition, the failings of American democracy fill volumes, and rightly so. Yet the fact that a tradition is neither perfect nor exclusive does not deny its reality.[319] Making "choices central to personal dignity and autonomy" is the defining characteristic of the American experience, and is therefore "deeply rooted in this Nation's history and tradition."[320]

e. The American Tradition Applied to Same-Sex Marriage

Treating same-sex marriage as a fundamental right is in this uniquely American tradition of letting people make "choices central to personal dignity and autonomy" free from government compulsion.[321] Undoubtedly, some of the sources that may be used to sustain this argument would have been appalled to lend their name to the endeavor.[322] Blackstone famously referred to sodomy as "a heinous act not fit to be named."[323] Justice Harlan explicitly excluded homosexuality from protection in *Poe*.[324] But legal sources that acknowledge rights of freedoms create a thing that is beyond their control.[325] The fact that their ideas can be used in ways of which they would not approve is perhaps the greatest testament to their wisdom.[326] It is no answer to say that same-sex couples are free to be with each other, just not to marry.[327] Being married

313. MCCULLOUGH, *supra* note 258, at 375 (emphasis added).

314. *Casey*, 505 U.S. at 851.

315. *See generally* MCCULLOUGH, *supra* note 258 (offering an in depth discussion of the attitudes and goals of the framers of the Constitution).

316. *See generally* DURANT IV, *supra* note 238 (offering a detailed description of Eighteenth century European life).

317. *Id.*

318. *Id.*

319. *See generally Poe*, 367 U.S. at 542 (Harlan, J., dissenting) (discussing both discarded and accepted traditions).

320. *Moore*, 431 U.S. at 503 (1977).

321. Tribe, *supra* note 33, at 1951; *see generally* Feigen, *supra* note 53 (advocating a constitutional right to same-sex marriage).

322. Tribe, *supra* note 33, at 1894.

323. *Id.*

324. *Poe*, 367 U.S. at 542 (1961) (Harlan, J., dissenting) ("Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal inquiry . . . .").

325. *See generally* Tribe, *supra* note 33 (discussing the meaning of freedom as it related to a fundamental rights analysis); *see generally* Loewy, *supra* note 108 (arguing that same-sex marriage is consistent with American notions of freedom).

326. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.

327. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.

changes how people view themselves, their relationship to each other, and their relationship as to the rest of the world.[328] To deny a marriage license is to shape an identity.[329]

Without a doubt, broad views of liberty need limiting principles.[330] In a sense, every action we take in life defines our meaning of existence; laws against drunk driving need not be judged by strict scrutiny because they might compel a person's identity.[331] But experience and instinct tell us that the thoughts we have, the words that we speak, the God to whom we pray, and the people we choose to love and cast our lot in life with surely are among the "choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment."[332]

D. Applying Strict Scrutiny

Accordingly, same-sex marriage should be viewed as a fundamental right.[333] However, that does not decide the question in and of itself.[334] A fundamental right is not an absolute right; its presence merely determines the proper standard of review.[335] Justice Cordy worried that allowing same-sex marriage would open the floodgates: "If one assumes that a group of mature, consenting, committed adults can form a marriage, the prohibition on polygamy (G.L. c. 207, § 4), infringes on their right to marry [and a law prohibiting it would not be allowed]."[336] It *would* infringe on their right; laws against the marriage of siblings or minors infringe on their rights as well, but are constitutional.[337] Strict scrutiny does not command that a right may not be infringed, just that it may only be infringed for a compelling reason.[338]

If strict scrutiny is applied to same-sex marriage, some of the rationales clearly fail.[339] If the rationale is "providing a favorable setting for procreation" then the law is both under- and over-inclusive; some people who have children are not married, and not all married couples

328. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.
329. *See generally* Tribe, *supra* note 33; Loewy, *supra* note 108.
330. *Michael H.*, 491 U.S. at 127.
331. *Id.*
332. *Casey*, 505 U.S. at 851 (1992); *see also* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
333. *See generally* Loewy, *supra* note 108 (arguing that same-sex marriage is a fundamental right).
334. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Strasser, *supra* note 155, at 329; Wardle, *supra* note 60, at 60.
335. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Strasser, *supra* note 155, at 329; Wardle, *supra* note 60, at 60.
336. *Goodridge*, 798 N.E.2d at 984 n.2 (Cordy, J., dissenting).
337. *Id.*; Strasser, *supra* note 155, at 32; Wardle, *supra* note 60, at 60.
338. *Goodridge*, 798 N.E.2d at 970 (Greaney, J., concurring); Strasser, *supra* note 155, at 329; Wardle, *supra* note 60, at 60.
339. *Goodridge*, 798 N.E.2d at 996, 1004 n.35 (Cordy, J., dissenting); Loewy, *supra* note 108, at 558.

have children.[340] The rationale of "preserving scarce State and private financial resources" fails for the same reason; not all married couples are a drain on the state budget, and some single people are such a drain.[341]

Other rationales take more careful consideration.[342] The rationale of "ensuring the optimal setting for child rearing" is perhaps the most important and controversial.[343] As Justice Sosman indicated, we are for all practical purposes in the first generation of same-sex couples raising children.[344] Although there are adamant beliefs on both sides, the effect on these children as they mature into adults is still by definition unknown.[345] Perhaps in the end, the constitutionality of a law prohibiting same-sex marriage will turn on the answer.[346] But the time to admit that the plaintiffs in *Goodridge* deserve the strict constitutional protection of a fundamental right is now.[347]

CONCLUSION

There is a natural tension between two truths in American life.[348] Law is by definition a conservative institution; it necessarily relies on precedent, history and tradition, so that people can know what it is and understand its meaning.[349] The law does not easily accept change.[350]

But the story of constitutional rights is the story of change.[351] In *United States v. Virginia*,[352] Justice Ginsburg quoted the historian Richard Morris: "A prime part of the history of our Constitution is the story of the extension of constitutional rights and protections to people once ignored or excluded."[353] Condoleezza Rice has said that "when the framers wrote the Constitution, they didn't mean me."[354] Today we mean her.[355]

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340. *Goodridge*, 798 N.E.2d at 996, 1004 n.35 (Cordy, J., dissenting).
341. *Id.* (Cordy, J., dissenting).
342. Duncan, *supra* note 146, at 164; *Goodridge*, 798 N.E.2d at 996 (Cordy, J., dissenting).
343. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 996 (Cordy, J., dissenting); Duncan, *supra* note 146, at 164; *see generally* Culhane, *supra* note 175, at 1194 (discussing the impact of same-sex marriage on children).
344. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting); *id.* at 996 (Cordy, J., dissenting); *see* Duncan, *supra* note 146, at 164; *see generally* Culhane, *supra* note 175 at 1194.
345. *Goodridge*, 798 N.E.2d at 978 (Sosman, J., dissenting).
346. *Id.*
347. Tribe, *supra* note 33, at 1951; *see generally* Feigen, *supra* note 53 (advocating a constitutional right to same-sex marriage).
348. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 990, 1003 (Mass. 2003) (Cordy, J., dissenting).
349. *Goodridge*, 798 N.E. at 990, 1003 (Cordy, J., dissenting).
350. *Id.* (Cordy, J., dissenting).
351. United States v. Virginia, 518 U.S. 515 (1996).
352. 518 U.S. 515.
353. Loewy, *supra* note 108, at 556 (citing *Virginia*, 518 U.S. at 557).
354. Testimony of Condoleezza Rice before the 9/11 Commission (April 8, 2004) (transcript available from New York Times).
355. *Id.*

If, in the search for fundamental rights, one looks to specific past traditions rather than principles, constitutional rights would never have been expanded.[356] In 1865 there was no tradition of free African-Americans in the south. In 1955 there was no tradition of inter-racial seating on buses and in theatres. In 1975 (in a battle that is still not won) there was no tradition of women getting paid as much as men. Today there is no tradition of same-sex marriage. To insist on looking at yesterday to see who needs protection today is to ensure a static society.[357]

The answer to the fundamental rights question left unresolved in *Goodridge v. Department of Public Health* will be found in this tension.[358] All of American history points towards answering the question in favor of the *Goodridge* plaintiffs.[359] The individual cases that make up the Supreme Court's jurisprudence for fundamental rights are bright stars indeed.[360] These cases have recognized protection for one's body[361] and mind,[362] the right to travel,[363] to marry,[364] to vote,[365] and the right to privacy.[366] Yet it is the constellation that these stars combine to create that has lit American history.[367] When one considers "the traditions from which [America] developed as well as the traditions from which it broke,"[368] Justice O'Connor's idea that we have the inherent right to control "choices central to personal dignity and autonomy"[369] free from government compulsion is not *an* American tradition, it is *the* American tradition.[370] Viewed as such, treating same-sex marriage as a fundamental right is simply one more contiguous chapter in the American story.[371]

The Supreme Judicial Court of Massachusetts chose to sidestep the issue of fundamental rights.[372] As such, it put off the real question for another court and another day.[373] Yet, by properly holding for the plaintiffs, the *Goodridge* court forces us to address issues that "constitute the

356. *See generally* Tribe, *supra* note 33 (arguing against viewing fundamental rights as a set of specific acts).
357. *Id.*
358. *Goodridge*, 798 N.E.2d at 990, 1003 (Cordy, J., dissenting); *see* Culhane, *supra* note 175.
359. Tribe, *supra* note 33, at 1937.
360. *Id.*
361. Skinner v. Oklahoma, 316 U.S. 535 (1942).
362. Meyer v. Nebraska, 262 U.S. 390 (1923).
363. Aptheker v. Secretary of State, 378 U.S. 500 (1964).
364. Loving v. Virginia, 388 U.S. 1 (1967); *Zablocki*, 434 U.S. 374 (1978).
365. Shaw v. Reno, 509 U.S. 630 (1993).
366. Roe v. Wade, 410 U.S. at 153 (1973).
367. Tribe, *supra* note 33, at 1937.
368. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).
369. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *see generally* Tribe, *supra* note 33 (discussing the meaning of freedom as it relates to a fundamental rights analysis).
370. Tribe, *supra* note 33, at 1937.
371. *Id.*
372. *Goodridge*, 798 N.E.2d at 990, 1003.
373. *Id.*

essential core of constitutionalism and the cornerstone of American liberty."[374] That is no small accomplishment.[375]

James Hart[*]

374. Tribe, *supra* note 33, at 1899.

375. *Id.*

* J.D. Candidate, May 2006. The author would like to dedicate this Comment to the memory of his grandparents, Justice James P. Hart and Katherine Drake Hart.

GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH: THE WRONG STEP AT THE WRONG TIME FOR SAME-SEX MARRIAGES

INTRODUCTION

Over the last ten years, states across the country have questioned the constitutionality of excluding same-sex partners from the benefits of civil marriage available to opposite-sex couples.[1] Most recently, Massachusetts answered the constitutionality debate by deciding that the Massachusetts Constitution protects same-sex couples' right to marry.[2] The core issues surrounding *Goodridge v. Department of Public Health*[3] include: 1) whether same-sex marriage is a constitutionally protected right making the regulation thereof subject to judicial scrutiny; and 2) whether laws excluding same-sex couples from access to marriage licenses discriminates solely on a suspect classification, such as sex, in violation of due process and equality provisions of state constitutions.[4]

This Comment addresses the wisdom of electing to pursue legitimization of same-sex marriage through judicial action instead of through the legislative process. Specifically, by pursuing legal recognition of same-sex marriages in the courtroom, gay-rights groups have opened the door to a backlash of constitutional amendments. As a result, these amendments could preclude long-term legal equality for same-sex committed relationships in the United States.

Part I of this Comment reviews the facts of *Goodridge*. Part II discusses similar cases from other states that preceded Massachusetts's landmark decision. Part III analyzes the majority and dissenting opinions in *Goodridge*. Finally, Part IV catalogues the public opinion and legislative actions generated by the decision.

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1. *See generally* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (concluding marriage statute violated Vermont Constitution's common benefits clause; resolved by creation of a civil union system); *but see* Standhardt v. Superior Court, 77 P.3d 451, 453 (Ariz. Ct. App. 2003) (holding marriage statute does not violate liberty interests under either Federal or Arizona Constitution).

2. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

3. *Goodridge*, 798 N.E. 2d at 941.

4. *Id.* at 953.

I. FACTS OF *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*[5]

On April 11, 2001, seven same-sex couples in Massachusetts filed suit in the Superior Court against the Department of Public Health and the Commissioner of Public Health for wrongfully denying them marriage licenses.[6] Procurement of a valid state-issued marriage license is a prerequisite to civil marriage in Massachusetts.[7] The plaintiffs argued that by denying these couples marriage licenses, the Department of Public Health deprived same-sex couples in the state from the obligations, benefits, and protections of civil marriage.[8] The defendants admitted to the practice of denying marriage licenses to same-sex couples in Massachusetts, but denied that this violated any law.[9]

The plaintiffs and defendants filed cross-motions for summary judgment.[10] On May 7, 2002, the superior court judge entered judgment for the defendants.[11] The judge reasoned that the statutory language was plainly inconsistent with the interpretation that a union between persons of the same sex could fall under the definition of marriage.[12] In addition, the superior court judge dismissed claims that denial of marriage licenses to these same-sex couples violated constitutional rights.[13] The court concluded that the Massachusetts Constitution does not guarantee a fundamental right to marry a person of the same sex.[14] Moreover, the ban on same-sex marriage did not "offend the liberty, freedom, equality, or due process provisions of the Massachusetts Constitution."[15] Furthermore, even if denying marriage licenses to same-sex couples violates their constitutional rights, the court opined that the legislature could limit certain rights if doing so rationally furthered a legitimate interest.[16]

The plaintiffs appealed the superior court's decision to grant summary judgment in favor of the defendants.[17] The Massachusetts Supreme Court vacated the summary judgment for defendants and remanded the case to the superior court to enter judgment for the plaintiffs.[18] However, the Supreme Court stayed its judgment for 180 days to allow the legislature time to take any appropriate action based on the decision.[19]

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5. 798 N.E.2d 941 (Mass. 2003).
6. *Goodridge*, 798 N.E. 2d at 949-50.
7. *Id.* at 950.
8. *Id.*
9. *Id.* at 950–51.
10. *Id.* at 951.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 969-70.
19. *Id.* at 970.

II. BACKGROUND

Historically, the definition of marriage is the union of one man and one woman.[20] The concept of civil marriage in the United States is derived from English common law.[21] Colonists adopted the English concept of marriage to regulate the procreation and care of children.[22]

A. Overview of Massachusetts Marriage Laws and Benefits

In Massachusetts, General Laws c. 207 (hereinafter "G.L. c. 207") is the marriage licensing statute.[23] The marriage licensing statute keeps close relatives, persons with syphilis, persons who are already married, and in some cases minors from obtaining a license for civil marriage.[24] The statute also delineates the procedures for making the civil marriage a matter of public record.[25]

The Massachusetts Constitution guarantees equality under the law and protects due process and liberty for all persons.[26] Although civil marriage is statutorily created, arguably it is a part of the constitutionally protected rights to equality and liberty.[27] In fact, the Massachusetts Constitution protects an individual's liberty from government intrusion into private matters to a greater extent than the Federal Constitution.[28] The promulgation of these laws affords married couples an exhaustive list of benefits.

Civil marriage offers many benefits in the Commonwealth of Massachusetts that domestic partnerships do not receive.[29] In civil marriages, courts and lawmakers have established predictable rules that govern stability and private responsibility for the care of children.[30] Additionally, married couples enjoy certain unique property rights.[31] For example, when a person dies intestate,[32] the surviving spouse will automatically inherit the deceased's property.[33] In wrongful death actions, surviving spouses, unlike unmarried domestic partners, may sue for loss of consor-

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20. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 952 (Mass. 2003).
21. *Goodridge*, 798 N.E.2d at 969.
22. *See id.* at 961.
23. *Id.* at 951.
24. *Id.* at 951-52.
25. *Id.* (citing MASS. GEN. LAWS ch. 207, § 20 (1998); MASS. GEN. LAWS ch. 207, § 28 (1998); MASS. GEN. LAWS ch. 207, § 40 (1998); MASS. GEN. LAWS ch. 17, § 4 (1998)).
26. *See id.* at 959-60.
27. *See id.* at 957.
28. *Id.* at 959 (citing Planned Parenthood League of Mass., Inc. v. Attorney Gen., 677 N.E.2d 101 (Mass. 1997); Corning Glass Works v. Ann & Hope, Inc., 294 N.E.2d (Mass. 1973)).
29. *Id.* at 955 (citing Wilcox v. Trautz, 693 N.E.2d 141 (1998)).
30. *Id.* at 956.
31. *See id.* at 955.
32. Intestate is defined in pertinent part as: "Of or relating to a person who has died without a valid will." BLACK'S LAW DICTIONARY 840 (8th ed. 2004).
33. *Goodridge*, 798 N.E.2d at 955 (citing MASS. GEN. LAWS ch. 190, § 1 (2004)).

tium.[34] Also, certain life insurance policies and social security benefits are only available to those who are or were married.[35] The right to marry, and thereby gain access to this myriad of benefits, is considered a "civil right."[36]

B. Marriage as a "Civil Right"

With technological innovations in the area of fertility, rising divorce rates, and changes in adoption policies, the concepts of marriage and family in the United States have changed over the last four decades.[37] Since the late 1960s, there has been a series of cases across the United States that classify marriage as a "civil right."[38]

1. *Perez v. Sharp*[39]

In 1948, the Supreme Court of California decided *Perez v. Sharp*.[40] In *Perez*, a mixed-race couple challenged a California law making it illegal for whites and blacks to marry.[41] The court ruled that the legislature may only interfere with the right to marry if there is "an important social objective [of public health, safety, and welfare]," and by "reasonable means."[42] The court reasoned that it is a violation of due process and equal protection to deny access to the fundamental right to marry based solely on "prejudice" and "oppressive discrimination."[43] In addition, the court ruled that part of the fundamental right to marry is the right to choose whom to marry.[44] Therefore, the court concluded that the statute was impermissible because it restricted the right of people to choose to marry somebody of a different race.[45]

2. *Loving v. Virginia*[46]

Cases challenging the constitutionality of denying same-sex couples the right to marry often rely on the reasoning in the 1967 Supreme Court

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34. *Id.* at 956 (citing MASS. GEN. LAWS ch. 229, § 2 (2000)).
35. *Id.* at 955.
36. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); *see also* Milford v. Worcester, 7 Mass. 48, 56 (1810).
37. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d at 961.
38. *See, e.g.*, *Loving*, 388 U.S. at 12 (quoting *Skinner*, 316 U.S. at 541); *see also Milford*, 7 Mass. at 56.
39. 198 P.2d 17 (Cal. 1948).
40. *Perez*, 198 P.2d at 17.
41. *Id.* at 17–18.
42. *Id.* at 19.
43. *Id.*
44. *Id.* at 21.
45. *Id.*
46. 388 U.S. 1 (1967).

decision *Loving v. Virginia*.[47] Like *Perez*, *Loving* addressed the constitutionality of a law prohibiting interracial marriage.[48] The Supreme Court held that Virginia's anti-miscegenation statutes violated the Due Process Clause of the Fourteenth Amendment and, thus, were constitutionally impermissible.[49] Specifically, classifications in statutes cannot be "an arbitrary and invidious discrimination."[50] Statutes that classify by race are particularly scrutinized because the category is considered automatically suspect.[51] These types of classifications are only permissible if they accomplish some state objective that is independent from racism.[52] The logic behind the *Loving* ruling fits nicely into same-sex marriage cases because denial of marriage licenses to same-sex couples is based on the gender of the potential spouse. Like race, gender is an automatically suspect classification.[53]

3. *Lawrence v. Texas*[54]

Advocates of same-sex marriage may have regarded the recent Supreme Court decision in *Lawrence v. Texas*[55] as evidence that the United States was ready for a case like *Goodridge*. In *Lawrence*, the Supreme Court held that a Texas sodomy statute, making it a crime for consenting adults of the same sex to engage in certain sexual conduct in private, was unconstitutional.[56] *Lawrence* overruled a prior Supreme Court decision, *Bowers v. Hardwick*,[57] which had held that such a statute did not violate the Due Process Clause of the Fourteenth Amendment.[58]

The *Lawrence* Court claimed that the liberty issue before the Court was not merely "the right to engage in certain sexual conduct," as claimed in *Bowers*, but rather the liberty allowing homosexual persons the right to "choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[59] The Texas statute subjected consenting adult homosexuals to criminal charges for private sexual conduct.[60] According to the Court, despite the misdemeanor nature of the crime, homosexuals convicted under the statute would have to report a criminal record on job and hous-

47. *Loving*, 388 U.S. at 1; *see also* Baehr v. Lewin 852 P.2d 44, 63 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause); *Goodridge*, 798 N.E.2d at 957.
48. *Loving*, 388 U.S. at 3-4.
49. *Id.* at 12.
50. *Id.* at 10.
51. *Id.* at 11.
52. *Id.*
53. *Goodridge*, 798 N.E.2d at 961 n.21.
54. 539 U.S. 558 (2003).
55. *Lawrence*, 539 U.S. at 558.
56. *See id.* at 578-79.
57. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 558.
58. *See Lawrence*, 539 U.S. at 578.
59. *Id.* at 567 (discussing framing of the issues in Bowers v. Hardwick, 478 U.S. 186 (1986)).
60. *Id.* at 562-63.

ing applications.[61] Additionally, in certain states, homosexuals convicted of sodomy would have to register as sex offenders.[62]

The *Lawrence* Court reviewed the history of sodomy statutes in the United States that revealed a trend toward abolishing same-sex prohibitions in sodomy laws.[63] Also, the Court claimed that there was widespread disapproval of the *Bowers* decision.[64]

The Court found no permissible rational basis for Texas to convict consenting adults acting in private under this sodomy law.[65] While the Court acknowledged that there is a deep-rooted belief in America that homosexual relationships are morally wrong, it concluded that it is not for the majority to impose their personal moral convictions on individuals.[66] The Court confirmed that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[67] Thus, in the matter of engaging in private consensual homosexual acts, the government has no right to interfere with the personal liberty of same-sex couples.[68] Although the Court used some language aimed at limiting the holding of *Lawrence* to same-sex sexual conduct,[69] the Court's reasoning could be extended to argue that same-sex marriage prohibitions violate the Due Process Clause of the Fourteenth Amendment.[70]

C. Same-Sex Marriage Cases Across the Nation

The Massachusetts Supreme Judicial Court was not the first state supreme court to encounter the constitutionality of denying access to civil marriage to same-sex couples. In the last decade, Hawaii, Alaska and Vermont all decided similar cases.[71] Each case concluded that it was impermissible under the respective state constitutions to deny state con-

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61. *Id.* at 575-76.
62. *Id.* at 575.
63. *Id.* at 572-73.
64. *Id.* at 576.
65. *Id.* at 578.
66. *Id.* at 571.
67. *Id.* at 574 (citing Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)).
68. *Id.* at 578.
69. *See, e.g., id.* at 567:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals . . . [t]his, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.

Id.

70. *Id.* at 599–600 (Scalia, J., dissenting).
71. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr*, 852 P.2d at 55; Baker v. State, 744 A.2d 864, 886 (Vt. 1999) (resolved by creation of civil union system).

ferred marital benefits to same-sex couples.[72] Yet, inevitably, the legislature in each state responded to the court's opinions by enacting legislation to expressly deny same-sex civil marriage.

1. Hawaii: *Baehr v. Lewin*[73]

Hawaii took the first steps toward judicially recognizing same-sex marriages in the United States.[74] In *Baehr v. Lewin*,[75] the plurality of the Hawaii Supreme Court reasoned that a state law excluding same-sex couples from obtaining marriage licenses may violate the Equal Protection Clause and Equal Rights Amendment of Hawaii's constitution.[76] The court stated that allowing opposite-sex couples access to marriage licenses, while denying marriage licenses to same-sex couples, constituted sex discrimination.[77] In looking at United States Supreme Court decisions that addressed the right to marriage, the court concluded that while there is a constitutional right to marriage, *same-sex* marriage is not a fundamental right. Specifically, the court opined that same-sex marriage was not covered by the right to privacy nor deeply "rooted in traditions."[78] Accordingly, the court overruled the trial court's judgment on the pleadings in favor of the defendant Health Department and remanded the case on the theory that denying same-sex couples access to marriage licenses might constitute a discrimination based on gender.[79] Moreover, the court requested an evidentiary hearing to decide if the statute in question "further[ed] compelling state interests" and was "narrowly drawn to avoid unnecessary abridgments of constitutional rights."[80] On remand, the trial court determined that the statute violated the Equal Protection Clause of the Hawaii Constitution and required the Health Department to issue marriage licenses to same-sex couples.[81]

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72. *See, e.g., Brause*, 1998 WL 88743 at *6 (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr*, 852 P.2d at 55 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Baker*, 744 A.2d at 886.

73. 852 P.2d 44 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

74. *See Baehr*, 852 P.2d at 68 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

75. 852 P.2d 44 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

76. *Baehr*, 852 P.2d at 55 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

77. Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 11 (1996).

78. *Id.* at 13.

79. *Id.* at 13-14.

80. *Id.* at 15.

81. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 at *22 (Haw. Cir. Ct. Dec. 3, 1996) (superseded by HAW. CONST. art. I, § 23).

In response to *Baehr*, the Hawaii legislature amended the Hawaii Constitution in 1998 to reserve marriage for opposite-sex couples.[82] However, in exchange, the legislature agreed to provide a benefits package for couples who were not married, including same-sex couples.[83] The same year that the Hawaii legislature amended Hawaii's constitution to exclude same-sex couples from the definition of marriage, the Supreme Court of Alaska decided a case similar to *Baehr*.

2. Alaska: *Brause v. Bureau of Vital Statistics*[84]

In 1998, Alaska became the second state to address the constitutionality of statutes banning same-sex marriage.[85] The court in *Brause v. Bureau of Vital Statistics*[86] held that the Alaska marriage code limiting civil marriage to unions between one man and one woman violated the right to privacy and equal protection provisions of Alaska's constitution.[87] The court equated the right to privacy with the right to be free from government intrusion into "intimate personal decisions of the individual."[88] Accordingly, because the Alaska marriage code interfered with the "intimate personal decision" of whom to marry, the court determined that the code violated an individual's right to privacy.[89] The court further reasoned that to ensure equal protection of fundamental rights, a state statute that discriminated based on sex should be subjected to the highest level of scrutiny.[90] Therefore, the court ruled that the parties needed to engage in further hearings to determine whether the state had a compelling interest in denying same-sex partners the fundamental right to marry.[91]

Although the court recognized the discrepancies between the rights of same-sex couples and those of opposite sex couples, subsequent legislation silenced this opinion. Like *Baehr*, an amendment to the Alaska constitution superseded the *Brause* decision.[92] Once again the legislature recognized marriage as "exist[ing] only between one man and one woman."[93]

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82. HAW. CONST. art. I, § 23.
83. David Orgon Coolidge, *The Hawai'i Marriage Amendment: It's Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 116 (2000).
84. No. 3AN-95-6562 CI, 1998 WL 88743 at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska).
85. *Brause*, 1998 WL 88743 at *3-*4, *6.
86. *Id.*
87. *Id.* at *1.
88. *Id.* at *6.
89. *Id.* at *5.
90. *Id.* at *6.
91. *Id.*
92. ALASKA CONST. art. I, § 25.
93. *Id.*

3. Vermont: *Baker v. State*[94]

One year later, the Vermont Supreme Court ruled that denying same-sex couples access to marriage licenses was impermissible under the state's constitution.[95] Unlike Hawaii, Alaska, and Massachusetts, Vermont's constitution includes a Common Benefits Clause distinct from equal protection.[96] The core of the Common Benefits Clause is the inclusion of all political groups.[97] Specifically, no one person or group can receive special benefits and advantages from the government that are not available to other groups.[98] The court concluded that because marriage came with certain unique benefits, the state could not arbitrarily exclude a group of persons from these state-conferred benefits.[99]

After *Baker*, the Vermont legislature had the choice to either include same-sex couples under the existing marriage laws or create a parallel statutory relationship to ensure equal benefits to same-sex couples.[100] Not surprisingly, the state legislature responded by codifying a system of civil unions that give all of the state benefits of marriage to same-sex committed partnerships without conferring on them the status of civil marriage.[101]

The federal government immediately reacted to the success of same-sex marriage cases. In 1996, following *Baehr*, Congress approved a bill to allow states to not recognize same-sex marriages performed in other states.[102] Additionally, the Defense of Marriage Act sought to define federally marriage as a union between one man and one woman.[103] On September 21, 1996, President Clinton signed the bill into law.[104] The federal government, faced with the possibility of same-sex marriage gaining recognition in certain states, enacted legislation on civil marriage, a subject traditionally left to the states to regulate.

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94. 744 A.2d 864 (Vt. 1999).

95. *Baker*, 744 A. 2d at 886.

96. *See* VT. CONST. art. VII, ch. 1:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

Id.

97. *Baker*, at 874-75.

98. VT. CONST. art. VII, ch. 1; *see also Baker*, 744 A.2d at 867.

99. *Baker*, 744 A.2d at 886.

100. *Id.* at 869.

101. VT. STAT. ANN. tit. 15, § 1204 (2003).

102. Charles Bierbauer, *Anti Gay Marriage Act Clears Congress*, CNN.com, (Sept. 10, 1996), *at* http://www.cnn.com/us/9609/10/gay.marriage.

103. Louise Schiarone, *Amendments Tie Up Anti Gay-Marriage Bill*, CNN.com, (Sept. 5, 1996), *at* http://www.cnn.com/us/9609/05/gay.marriages/index.html.

104. 1 U.S.C. § 7 (1996); *see also* Defense of Marriage Act of 1996, H.R. 3396, 104th Cong. § 2-3 (1996).

In summary, the fate of past court decisions from other states on the same-sex marriage issue were indicators that: 1) public opinion did not support same-sex marriage; and 2) if a court ruling threatened to force a state to issue marriage licenses to same-sex couples contrary to public opinion, legislatures would act on behalf of constituents to prevent it. Despite this backdrop, seven same-sex couples brought a case similar to *Baehr*, *Brause*, and *Baker* in Massachusetts.

III. *GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH*[105]

Notwithstanding the failure of the previous state cases to enact longstanding change, seven same-sex couples in Massachusetts turned to the judicial system to grant them access to civil marriage. In *Goodridge v. Department of Public Health*,[106] the Supreme Judicial Court of Massachusetts found that: 1) same-sex couples were statutorily denied marriage licenses; and 2) this denial violated the Massachusetts Constitution.[107]

First, the court dissected the literal and textual meaning behind the Massachusetts marriage license statute, G.L. c. 207, and concluded that it excluded same-sex couples from obtaining marriage licenses.[108] Next, the court analyzed whether G.L. c. 207 violated the state constitution's due process and equal protection provisions.[109] Using a rational basis standard of review, the majority concluded that the marriage license statute violated the state constitution.[110] Alternatively, the concurring justice felt that the court did not need to consider due process and equal protection arguments because the statute impermissibly discriminated on the basis of sex in violation of Article I of the Declaration of Rights as amended by Article 106 of the Amendments to the Massachusetts Constitution.[111] Finally, the dissenting justices disagreed that the marriage license statute violated the state constitution.

A. *Majority Opinion: Rejecting the Defendants' Rational Basis Arguments to Find G.L. c. 207 Violated the State Constitution*

The defendants first claimed that G.L. c. 207 was rational because it promoted procreation.[112] Although the procreation of future generations was of great importance in early American history, the majority reasoned that fertility was no longer the core purpose of marriage.[113] The majority

105. 798 N.E.2d 941 (Mass. 2003).
106. *Goodridge*, 798 N.E. 2d at 941.
107. *Id. at* 953, 963.
108. *See* MASS. ANN. LAWS ch. 207, § 1 (Law. Co-op. 2004); *Goodridge*, 798 N.E.2d at 951, 953.
109. *Goodridge*, 798 N.E.2d at 960–61, 963.
110. *Id.* at 960–61.
111. *Id.* at 970 (Greaney, J., concurring).
112. *Id.* at 961.
113. *Id.*

based their assessment on the facts that: 1) not all married couples can or do have children;[114] 2) marriage is not a prerequisite to bearing children; and 3) lack of fertility is not a valid ground for dissolving a marriage.[115] Thus, the majority disagreed with the defendants' procreation rationale by noting that procreation is not the central defining goal of the institution.[116]

The majority also discarded the defendants' second claim that the statute was permissible because it guaranteed the "optimal" setting for child rearing.[117] The majority found this claim baseless. The fact that same-sex couples could already legally adopt children in the state undermined this argument.[118] In addition, the majority reasoned there was a lack of sufficient research to prove definitively that a household with parents of the opposite-sex was the best setting for child rearing.[119] The majority further suggested that the classification of same-sex couples as a less desirable child-rearing unit may have, in part, been based on the fact that same-sex couples were denied the benefits of civil marriage in the first place.[120] Therefore, the defendants failed to convince the court that the marriage license statute furthered a legitimate government interest in the welfare of children.

Finally, the majority rejected the defendants' third argument that the statute was rationally permissible because it safeguarded state and private resources.[121] The majority reasoned that many of the *Goodridge* same-sex couples had dependants who needed the same state protections afforded to dependants of opposite-sex couples.[122] Also, the majority explained that the decision to provide married couples with certain benefits was not based on a demonstration of financial dependence of one partner.[123] Thus, the majority reasoned that even if same-sex couples were financially less dependant on one another, their independent financial stability was not a reason to deny them the benefits of civil marriage.[124]

In conclusion, the defendants failed to provide a rational basis for the legislature to deny same-sex couples access to civil marriage. As a result, the majority found that the marriage license statute was impermissible under the Massachusetts Constitution.[125]

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114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 961, 963.
118. *Id.* at 962.
119. *Id.* at 962–63.
120. *Id.* at 963.
121. *Id.* at 964.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

B. Justice Greaney's Concurring Opinion: G.L. c. 207 Impermissibly Discriminates Based on Gender

In his concurrence, Justice Greaney opined that the court could resolve the issue based on constitutionally impermissible sex discrimination alone.[126] Justice Greaney asserted that the court need not look beyond Article I of the Declaration of Rights as amended by Article 106 of the amendments to the Massachusetts Constitution, which prohibits discrimination based on "sex, race, color, creed, or national origin."[127] Simply put, Justice Greaney reasoned that because the right to marry was part of a fundamental right to enjoy life and that discriminating against same-sex couples was a discrimination based on the sex of the marital partner, the marriage licensing statute was unconstitutional.[128]

Justice Greaney further stated that the court was not limited to the traditional definition of marriage as being between one man and one woman.[129] Specifically, he suggested that the court should scrutinize the validity of that definition in light of Article I.[130] According to Justice Greaney, "neither the mantra of tradition, nor individual conviction, can justify the perpetuation of a hierarchy in which couples of the same sex and their families are deemed less worthy of social and legal recognition than couples of the opposite sex and their families."[131] In fact, Justice Greaney likely would have included same-sex committed couples in the definition of marriage despite the literal and textual meanings of marriage derived by the majority.

C. Justice Spina's, Justice Sosman's, and Justice Cordy's Dissents: The Court Misapplied the Rational Basis Standard and, thus, Usurped Legislative Power

Justices Spina, Sosman, and Cordy dissented.[132] The dissenting justices in *Goodridge* did not agree that the Massachusetts marriage statute violated the state constitution. Justice Spina expressed concern with: 1) the court usurping legislative power;[133] 2) the court misconstruing the sex discrimination element of the equal protection argument;[134] 3) the char-

126. *Goodridge*, 798 N.E.2d at 971 (Greaney, J., concurring).

127. *Id.* at 970 (citing MASS. CONST. art I (2004), *amended by* MASS. CONST. art. CVI. Art. I). All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Id.

128. *Id.* at 970–71 (Greaney, J., concurring).

129. *Id.* at 972–73 (Greaney, J., concurring).

130. *Id.* at 973 (Greaney, J., concurring).

131. *Id.* (Greaney, J., concurring).

132. *Goodridge*, 798 N.E.2d at 974.

133. *Id.* at 974 (Spina, J., dissenting).

134. *Id.* at 975 (Spina, J., dissenting).

acterization of the fundamental right to marry as including same-sex unions;[135] and 4) the revising of the statute to be gender neutral.[136] Justice Sosman, on the other hand, feared that the court did not properly apply the rationality standard of review.[137] Finally, Justice Cordy shared Justice Spina's concerns regarding redefining marriage to include same-sex unions, and deciding the same-sex marriage debate in court instead of through the legislative process.[138] Justice Cordy also opined that there was no fundamental right to privacy issue at stake.[139]

1. Justice Spina's Dissent

Justice Spina expressed concerns that the majority overstepped its judicial boundaries.[140] Simply put, the power to regulate marriage is held by the legislature and, therefore, Justice Spina argued that the court was usurping that power.[141]

According to Justice Spina, the Massachusetts statute does not discriminate against any particular group but applies to all individuals equally.[142] Justice Spina reasoned that the gender contemplated was the gender of the person to whom the law applies, not the gender of that person's partner.[143] Thus, the inability to marry a person of the same sex applied equally to all persons under the law.[144] Additionally, Justice Spina explained that the marriage statute did not discriminate based on sexual orientation.[145] First, like a heterosexual person, a homosexual person was free to enter into a permissible civil marriage with a person of the opposite sex.[146] Second, homosexual and heterosexual persons were also equally denied the ability to marry a person of the same sex.[147] Despite the plaintiffs' equal protection argument, Justice Spina found that G.L. c. 207 did not discriminate on the basis of gender.[148]

Next, Justice Spina addressed the plaintiffs' due process argument. Justice Spina reasoned that because same-sex marriage was not "deeply rooted in the nation's history," it did not meet the test of a fundamental right.[149] While Justice Spina conceded that people have a right to choose whom to marry, he claimed that the choice had not traditionally involved

135. *Id.* at 976 (Spina, J., dissenting).
136. *Id.* at 977 (Spina, J., dissenting).
137. *Id.* at 978–79 (Sosman, J., dissenting).
138. *Id.* at 984, 987 (Cordy, J., dissenting).
139. *Id.* at 986 (Cordy, J., dissenting).
140. *Id.* at 974 (Spina, J., dissenting).
141. *Id.* (Spina, J., dissenting).
142. *Id.* (Spina, J., dissenting).
143. *Id.* (Spina, J., dissenting).
144. *Id.* (Spina, J., dissenting).
145. *Id.* at 975 (Spina, J., dissenting).
146. *Id.* (Spina, J., dissenting).
147. *Id.* (Spina, J., dissenting).
148. *Id.* at 974 (Spina, J., dissenting).
149. *Id.* at 976 (Spina, J., dissenting).

the right to choose a person of the same sex.[150] According to Justice Spina, there was no constitutionally protected right, fundamental or otherwise, at stake in this case and, therefore, the majority was wrong to apply even a rational basis test.[151]

Finally, Justice Spina reasoned that the majority's remedy of making the statute gender neutral was outside the bounds of permissible judicial discretion.[152] The judiciary may only revise a legislative statute if the legislative intent is preserved.[153] Thus, according to Justice Spina, changing gender specific wording into gender neutral language violated legislative intent.[154]

2. Justice Sosman's Dissent

Justice Sosman opined that the majority misused the rational basis standard of review by holding it to too high of a threshold.[155] The rational basis standard of review requires that the statute "satisfies a minimal threshold of rationality."[156] Thus, the reasons given by the defendants met this minimal threshold. In addition to her concerns about use of the rational basis standard, Justice Sosman also was concerned that there was no compelling reason for the court to force the state to give same-sex couples the benefits singled out for opposite-sex couples.[157] According to Justice Sosman, there was insufficient evidence that same-sex couples are essentially the same as opposite-sex couples.[158] In fact, Justice Sosman noted that many opposite-sex couples with families are not receiving the benefits of marriage. Hence, Justice Sosman concluded that there was no compelling reason to single out same-sex couples to receive benefits denied to all types of families without sufficient scientific studies to back up the assertion.[159]

3. Justice Cordy's Dissent

Finally, Justice Cordy expressed concern with the majority's interpretation of the definition of marriage, and believed this issue was better left to the legislature.[160] In Justice Cordy's opinion, the majority improperly redefined marriage to include unions of same-sex partners so that it could declare that the Massachusetts marriage license statute vio-

150. *Id.* (Spina, J., dissenting).
151. *Id.* (Spina, J., dissenting).
152. *Id.* at 977 (Spina, J., dissenting).
153. *Id.* (Spina, J., dissenting).
154. *Id.* (Spina, J., dissenting).
155. *Id.* at 978–79 (Sosman, J., dissenting).
156. *Id.* at 978 (Sosman, J., dissenting).
157. *Id.* at 978–79 (Sosman, J., dissenting).
158. *Id.* at 979 (Sosman, J., dissenting).
159. *Id.* at 981 (Sosman, J., dissenting).
160. *Id.* at 984, 1004 (Cordy, J., dissenting).

lated a fundamental right to marry.[161] Yet, according to Justice Cordy, the fundamental right to marry has never included the right to marry a person of the same sex.[162] Justice Cordy argued that many of the cases claiming that the right to marry was a fundamental right implicitly meant that procreation with a chosen partner was a fundamental right.[163] Therefore, Justice Cordy concluded that this case did not implicate the right to privacy issue because the right to privacy only applies to sexual relations.[164] In particular, G.L. c. 207 did not interfere with the ability to have a homosexual relationship; it merely meant that the state did not want to single out such relationships for these types of benefits.[165] Furthermore, Justice Cordy advised that the court should hesitate to make decisions that might create a new fundamental right when public opinion on same-sex marriage was unknown.[166] According to Justice Cordy, the best way to determine public opinion is to leave it to the legislature to decide the same-sex marriage issue.[167]

The majority and dissenting opinions in *Goodridge* disagreed about whether the case involved determining the constitutionality of a state statute or deferring a political decision to the legislature. However, even if the court agreed that the case was about the constitutionality of the Massachusetts statute, the majority and dissent disagreed about how to apply the rational basis standard of review to the statute. Because the majority deemed the case to be a determination of the constitutionality of a state statute, it was properly decided by the court and not by the legislature. However, the plaintiffs' wisdom in bringing the case rather than pursuing legislative action was dubious in light of the backlash of constitutional amendments that similar cases in other states had sparked.

IV. ANALYSIS

The *Goodridge* dissents' concern that the issue of same-sex marriage should have been left to the legislature is well founded. Although marriage is a civil institution, it also has deep religious and traditional meanings to Americans that are inconsistent with the inclusion of same-sex partnerships. Such an emotionally charged issue should be left to the representatives of popular opinion to decide. This analysis will cover several of the issues related to deciding this question in court instead of through the legislative process. First, there is recent legislative and judicial action indicating that Americans on the whole favor a definition of marriage limited to unions between one man and one woman. Second,

161. *Id.* at 984 (Cordy, J., dissenting).
162. *Id.* (Cordy, J., dissenting).
163. *Id.* at 985 (Cordy, J., dissenting).
164. *Id.* (Cordy, J., dissenting).
165. *Id.* at 986–87 (Cordy, J., dissenting).
166. *Id.* at 1004 (Cordy, J., dissenting).
167. *Id.* (Cordy, J., dissenting).

the bans on same-sex marriage, anti-miscegenation laws, and sodomy are not so analogous as to indicate a need for judicial action to override constitutional violations. Third, polls of public opinion indicate a more favorable political environment for same-sex civil unions with marriage-like benefits than for same-sex marriages. Finally, by resolving the issue in court, *Goodridge* has resulted in pre-emptive strikes against same-sex marriages in both state and federal forums that leave persons granted same-sex marriages in Massachusetts in a tenuous legal position.

A. Legal Action Indicates Resistance to Same-Sex Marriage

Legal recognition of committed domestic relationships and equal access to benefits regardless of sexual orientation undoubtedly is desirable. However, forcing recognition and access through a state supreme court decision may not be the best route to achieving this goal. Without the support of popular opinion, a state supreme court decision leaves the door open for constitutional amendments that would definitively exclude same-sex couples from ever having access to the institution of marriage. In fact, a similar holding in the Supreme Court of Alaska led to exactly that result.[168]

Following the landmark decision in *Baehr v. Lewin*[169] in 1993, the Republican dominated Congress passed the Defense of Marriage Act.[170] This act defined marriage at the federal level as being the union of one man and one woman.[171] In addition, this legislation gave states permission to give no credit to same-sex marriages solemnized in other states.[172] President Clinton signed the bill into law in 1996.[173] State legislatures across the country followed suit and enacted state Defense of Marriage Acts to: 1) define marriage as a union between one man and one woman; and 2) express their intentions to hold as invalid any same-sex marriage solemnized in other states.[174]

Thirty-eight states have current statutes defining marriage as the union between one man and one woman.[175] In addition, in Minnesota, one of the states without such a statute, the supreme court ruled in 1971 that

168. *See* Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 at *4 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, ALASKA CONST. art. I, § 25).

169. 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings).

170. *See* Charles Bierbauer, *Anti Gay Marriage Act Clears Congress*, CNN.com, Sept. 10, 1996, *at* http://www.cnn.com/us/9609/10/gay.marriage.

171. *See* Louise Schiavone, *Amendments Tie Up Anti Gay-Marriage Bill*, CNN.com, Sept. 5, 1996, *at* http://www.cnn.com/us/9609/05/gay.marriages/index.html.

172. Schiavone, *supra* note 171.

173. Bierbauer, *supra* note 170.

174. *See* B.A. Robinson, *Same Sex Marriages (SSM) and Civil Unions*, RELIGIOUS TOLERANCE.ORG, *at* http://www.religioustolerance.org/hom_marr.htm (last updated March 8, 2005).

175. Robinson, *supra* note 174.

same-sex marriage is not allowed under the statute and that the statute does not deprive these couples of any fundamental right.[176]

Cases similar to *Goodridge* and previous same-sex marriage disputes have been unsuccessful in Arizona and the District of Columbia.[177] Of the four state supreme courts that have declared state statutes limiting marriage to opposite-sex couples to be a violation of state constitutions, only the decision in Massachusetts resulted in an order to grant marriage licenses to same-sex couples.[178] Of the three remaining states, Alaska and Hawaii passed amendments to the state constitutions defining marriage as the union between one man and one woman.[179] These constitutional amendments rendered the state statutes at issue in the cases constitutionally valid. Finally, Vermont created a parallel institution to grant state benefits and the responsibilities of marriage to same-sex couples without giving them the status of being married.[180]

In 2004, courts in both New York and California decided cases brought against public officials for solemnizing same-sex marriages in violation of state statutes.[181] While the Justice Court of New York dismissed the charges, because the court determined the statute refusing marriage licenses to same-sex couples violated equal protection laws,[182] the case from California resulted in invalidation of all same-sex marriages obtained in violation of the state statute.[183]

These court decisions, statutory enactments and proposed constitutional amendments demonstrate a lack of cohesion across the United States in opinions about same-sex marriage. However, the fact that to date no state has enacted a law or constitutional amendment declaring same-sex marriage legal is a clear indicator that public opinion does not strongly support same-sex couples having the right to marriage.[184] In fact, the myriad of Defense of Marriage Acts and amendments to state constitutions specifically excluding same-sex couples from the definition of marriage, demonstrate a greater tendency of Americans to vote against marriage for same-sex couples when given the choice.[185] The plaintiffs

176. *See* Baker v. Nelson, 191 N.W.2d 185, 186–87 (Minn. 1971).

177. *See* Standhardt v. Super. Ct. of Ariz., 77 P.3d 451, 465 (Ariz. Ct. App. 2003); Dean v. Dist. of Columbia, 653 A.2d 307, 361 (D.C. 1995) (per curiam).

178. *See* ALASKA CONST. art.1, § 25; HAW. CONST. art. I, § 23; *Brause*, 1998 WL 88743 at *4 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, ALASKA CONST. art. I, § 25); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003); Baker v. State, 744 A.2d 864, 889 (Vt. 1999).

179. *See* ALASKA CONST. art.1, § 25; HAW. CONST. art. I, § 23.

180. *See Baker*, 744 A.2d at 889.

181. *See* Lockyer v. City and County of San Francisco, 95 P.3d 459, 464 (Cal. 2004); People v. West, 780 N.Y.S.2d 723, 723-24 (N.Y. Jus. Ct. 2004).

182. *West*, 780 N.Y.S.2d at 725.

183. *Lockyer*, 95 P.3d at 499.

184. *See generally* Robinson, *supra* note 174.

185. *See, e.g.*, ALASKA CONST. art.1, § 25; HAW. CONST. art. I, § 23.

in *Goodridge* obviously were undeterred by the negative history evidenced by the other similar same-sex marriage cases.

The plaintiffs in *Goodridge* may have sought access to civil marriage through the court system because the United States has a history of promoting important social change by engaging the judicial branch.[186] Arguably, the civil rights movement of the 1960s was spurred by the Supreme Court's opinion in *Brown v. Board of Education*.[187] In *Brown*, the Court recognized the social stigma and psychic harm caused by segregating school children.[188] A backlash of resistance to desegregation followed the *Brown* decision, just as a backlash of resistance to inclusion of same-sex unions in the definition of marriage followed *Goodridge* and similar cases.[189] Supporters of seeking access to civil marriage for same-sex couples through the judicial system may see the eventual acceptance of desegregation and success of the civil rights movement as indicators that long-term social change will result from decisions like *Goodridge*. However, there is an argument that *Brown* was not the start of the civil rights movement, just a step in a process already in motion.[190] In fact, there may have already been a social, economic, and political climate that would have eventually led to the Civil Rights Act in the absence of *Brown*.[191] Some argue that *Brown's* major contribution to the civil rights movement was motivating opponents of desegregation to violence.[192] This display of violence may have sparked otherwise unmotivated supporters to take action.[193]

So far, *Goodridge* and similar cases have not sparked violence by opponents, just constitutional amendments precluding the possibility of long-term access to civil marriage for same-sex couples.[194] The continuing success of these state constitutional amendments defining marriage as the union between one man and one woman shows that the present social, economic and political climate of the United States does not support a social change in favor of civil marriage for same-sex couples.

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186. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954); Roe v. Wade, 410 U.S. 113, 164–65 (1973).

187. *See* Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13 (1994) (citing EARL BLACK, SOUTHERN GOVERNORS AND CIVIL RIGHTS: RACIAL SEGREGATION AS A CAMPAIGN ISSUE IN THE SECOND RECONSTRUCTION 109 (1976)).

188. *See Brown*, 347 U.S. at 494–95.

189. *Compare* Klarman *supra* note 187, at 11 *with* Kavan Peterson, *50-state rundown on gay marriage laws*, Stateline.org (last updated Nov. 3, 2004), *at* http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058.

190. *See* Klarman, *supra* note 187, at 80–85.

191. *See* Klarman, *supra* note 187, at 71–76.

192. Klarman, *supra* note 187, at 76.

193. Klarman, *supra* note 187, at 11.

194. *See* Peterson, *supra* note 189.

B. Goodridge *not analogous to* Lawrence v. Texas,[195] Perez v. Sharp,[196] *and* Loving v. Virginia[197]

Despite the emergence of state constitutional amendments against same-sex marriage, the recent Supreme Court decision in *Lawrence v. Texas*[198] might be construed as an indicator of a favorable political climate for change in the treatment of homosexual couples.[199] Yet, *Lawrence* dealt strictly with the right to privacy and freedom from governmental intrusion into the private sexual conduct of its citizens.[200] *Lawrence* did not deal with state-conferred benefits for couples engaged in those private relationships.[201] While the *Lawrence* decision took the government officially out of the role of actively prosecuting private intimate associations, the ruling did not mandate that legislatures provide statutory support for homosexuality.[202]

At issue in *Lawrence* was a Texas criminal statute used to prosecute adult homosexuals engaged in private consensual acts.[203] At issue in *Goodridge* was a civil code used to confer on heterosexual couples a public status and to give them certain state benefits.[204] Criminalizing the private conduct of a class of citizens is different from offering a package of benefits to go along with a civilly conferred status. Moreover, denying same-sex couples access to civil marriage does not attach the same stigma to homosexuals as having a criminal record for engaging in their private intimate relationships. Additionally, unlike *Lawrence*, the state did not rationalize offering civil marriage only to opposite-sex couples by condemning the morality of same-sex relationships.[205] Instead, the state argued that the statute furthered legitimate government interests in procreation, guaranteed optimal child-rearing settings, and safeguarded state and private resources.[206]

Finally, there has been no similar movement in the United States to criticize or refuse to adhere to civil marriage statutes. Although, there have been a few isolated legal cases, and some disobedience of controlling civil marriage laws, there has not been a pattern of not enforcing the limitation of marriage to opposite-sex couples.[207] In fact, the few court

195. 539 U.S. 558 (2003).
196. 198 P.2d 17 (Cal. 1948).
197. 388 U.S. 1 (1967).
198. *Lawrence*, 539 U.S. at 578–79.
199. *See id.* at 599–602 (Scalia, J., dissenting).
200. *See id.* at 578.
201. *See id.*
202. *Id.* at 578–79.
203. *Id.* at 563.
204. *Goodridge*, 798 N.E.2d at 950–51.
205. *See id.* at 961.
206. *Id.*
207. *See, e.g.*, *Brause*, 1998 WL 88743 at *4–*6 (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, article I, section 25 of the Constitution of Alaska); *Lockyer*, 95 P.3d at 498; *Baehr*, 852 P.2d at 57–58 (concluding

decisions and acts of disobedience have mostly been met with backlash and, thus, reaffirm the disapproval of same-sex marriage.[208]

Because *Lawrence* decided only the constitutionality of prohibiting private sexual conduct by criminalizing it, and not promoting certain civil relationships for legitimate government purposes, the decision does not support the idea that civil marriage laws violate due process and equal protection.[209] As a result, the Massachusetts Supreme Court's decision to recognize same-sex marriage may do more harm than good for homosexuals in the United States. While *Lawrence* may have seemed like an invitation by the Supreme Court to challenge the constitutionality of denying same-sex couples access to marriage, the Court limited its holding to criminalized private sexual conduct.[210] Thus, state laws banning same-sex marriage are easily differentiated from those criminalizing private adult consensual homosexual acts.

Moreover, unlike the couples in *Perez v. Sharp*[211] and *Loving v. Virginia*,[212] same-sex couples do enjoy a host of benefits similar to those enjoyed by married couples.[213] Plaintiffs questioning the constitutionality of denying same-sex couples the right to civil marriage tend to rely on the reasoning of these two cases that struck down anti-miscegenation laws.[214] Under the respective provisions of the statutes in *Perez* and *Loving*, mixed-race couples could not get married.[215] In fact, prior to the 1980s, no private or governmental entities in the United States conferred benefits on domestic partners.[216] Thus, without recognition of their civil marriages, these mixed-race couples had no protective legal relationship available to them.[217] While same-sex couples do not qualify for civil marriage in the majority of states, they do qualify for many domestic partner benefits similar to those offered to married couples.[218] Overall, the political standing of same-sex couples in the United States today is

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marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Baker*, 744 A.2d at 886; *but cf. Dean*, 653 A.2d at 361; *West*, 780 N.Y.S. 2d at 725.

208. *See, e.g.*, Peterson, *supra* note 189.

209. *See Lawrence*, 539 U.S. at 578.

210. *See id.*

211. 198 P.2d 17 (Cal. 1948).

212. 388 U.S. 1 (1967).

213. Mikaila Mariel Lemonik Arthur, *An Encyclopedia of Gay, Lesbian, Bisexual, Transgender, and Queer Culture: Domestic Partnerships* (Feb. 28, 2004), *at* www.glbtq.com/social-sciences/domestic_partnerships.html (last visited January 17, 2005).

214. *See, e.g., Standhardt*, 77 P.3d at 458; *Baehr*, 852 P.2d at 61–63 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Goodridge*, 798 N.E.2d at 957–58.

215. *Loving*, 388 U.S. at 6; *Perez*, 198 P.2d at 18.

216. Arthur, *supra* note 213.

217. *Id.*

218. *Id.*

not as perilous as the standing of mixed-race couples facing anti-miscegenation laws prior to recognition of domestic partner benefits.[219]

C. *Reactions to* Goodridge

1. Popular Opinion

At this time, there are no clear indicators that popular opinion in Massachusetts supports access to civil marriage for same-sex couples. Specifically, popular opinion polls on same-sex marriage indicated that Massachusetts's voters are divided on the issue. A poll taken in Massachusetts following the *Goodridge* decision indicates that popular opinion did support the court's ruling to legalize same-sex marriages.[220] The poll results showed that 50 percent of the 400 persons asked supported the court's decision, while only 38 percent opposed it.[221] When polled about support for an amendment to the state constitution defining marriage to exclude same-sex couples, 53 percent opposed passing an amendment and only 36 percent supported it.[222] While these results seem to indicate the support of popular opinion for the social change sought by the plaintiffs, another poll taken in Massachusetts produced different results.[223]

According to a poll conducted by RKM Research and Communications, 76 percent of Massachusetts voters believed that same-sex couples should have access to the same marital benefits afforded to opposite sex couples.[224] However, only 49 percent of the polled individuals supported calling the system of benefits for same-sex couples "marriage."[225] The results of this poll indicate that the political and social climate of the state may be ready for civil unions but not for same-sex civil marriage.[226]

Recent legislative decisions in other states indicate that civil unions have more popular support than do civil marriages for same-sex couples.[227] When the Vermont legislature decided to enact a parallel system of civil unions in place of same-sex civil marriage, the Vermont legislature explained: "Granting benefits and protections to same-sex couples

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219. *Id.*

220. Frank Phillips & Rick Klein, *Fifty Percent in Poll Back SJC Ruling on Gay Marriage*, BOSTON GLOBE, Nov. 23, 2003, *available at* http://www.glad.org/marriage/globe+herald_polls_11-23-03.shtml (taken for Boston Globe and WBZ-TV).

221. *Id.*

222. *Id.*

223. David R. Guarino, *Same-Sex Benefits Get Voters' Blessings: Most OK Gay Marriage*, BOSTON HERALD, Nov. 23, 2003, *available at* http://www.glad.org/marriage/globe+herald_polls_11-23-03.shtml.

224. *Id.*

225. *Id.*

226. *See id.*

227. *See* An Act Relating to Civil Unions, Pub. Act No. 91, § 1(10), 2000 Vt. Acts & Resolves (2000), *available at* http://www.leg.state.vt.us/docs/2000/acts/act091.htm (last visited March 8, 2005); David Orgon Coolidge, *Same-Sex Marriage: As Hawaii Goes . . .* , 72 FIRST THINGS 33, 33–37 (1997), *available at* http://www.firstthings.com/ftissues/ft9704/articles/coolidge.html.

through a system of civil unions will provide due respect for tradition and long-standing social institutions, and will permit adjustment as unanticipated consequences or unmet needs arise."[228] The civil union approach was also palatable to Hawaiians following the state supreme court's ruling in *Baehr*.[229] The amendment to Hawaii's constitution defining marriage as a union between one man and one woman did not pass until there also was a bill proposing a civil union system of benefits for same-sex couples.[230]

In an effort to recognize civil unions, an amendment excluding same-sex couples from getting married and instead creating a Vermont-style civil union system has already passed the first round of approval in the Massachusetts legislature.[231] If the amendment gets re-approved in 2005, Massachusetts's voters could decide the issue in 2006.[232] If this amendment becomes part of the state constitution, it is unclear what status same-sex couples married between May 17, 2004 and 2006 will have.[233] Therefore, without a clear majority in favor of the decision in *Goodridge*, same-sex couples are getting married in Massachusetts absent guarantees that their marriages will be valid two years from now.[234]

Despite the Massachusetts legislature's movement toward a civil union system, the *Goodridge* court opined that civil unions were not enough to satisfy the constitutional issues.[235] According to the court, only full scale civil marriage for same-sex couples would suffice.[236] Because the *Goodridge* court refused to substitute civil unions for civil marriage, same-sex couples in Massachusetts may only receive state-conferred marital benefits through an institution not clearly supported by public opinion. As a result, same-sex married couples in Massachusetts are in a tenuous position that they would not have been in had they sought change through legislation and not through the court system.

2. Interstate Effects

Furthermore, the *Goodridge* decision put other states on alert about the constitutionality of Defense of Marriage Act laws. States have reacted by enacting pre-emptive state constitutional amendments precluding the possibility of widespread recognition of same-sex marriages in the United States. An opinion poll conducted with a national sample

228. Act Relating to Civil Unions, *supra* note 227, at § 1(10).
229. *See* Coolidge, *supra* note 227.
230. *Id.*
231. *See* Peterson, *supra* note 189.
232. *Id.*
233. Theo Emery, *Same-Sex Couples Marry in Massachusetts*, GrandForksHerald.com, May 17, 2004, *at* http://www.grandforks.com/mld/grandforks/8682758.htm (last visited March 8, 2005).
234. *See id.*
235. *See* In re Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004) (court responding to legislature's question about whether civil unions would suffice).
236. *Id.* at 571–72.

showed a similar tendency to favor civil unions over civil marriage for same-sex couples.[237] While 56 percent of people oppose or strongly oppose civil marriage for same-sex couples, only 32 percent favor or strongly favor civil marriage.[238] Only 43 percent of those polled oppose or strongly oppose a system of civil unions and 49 percent favor or strongly favor civil unions.[239] Winning recognition of same-sex marriage in one state does not result in federal marriage benefits for these couples, nor does it guarantee recognition of the marriage in any other state.[240] Forcing legal recognition of marriages between persons not fitting the traditional definition of a married couple in one state puts other states on alert to take pre-emptive measures to exclude these marriages from recognition in their borders.[241] Ultimately, this will impede the mobility of same-sex married couples, because moving outside the State of Massachusetts could mean losing marriage benefits.[242]

In response to *Goodridge*, Governor Romney of Massachusetts has revived a turn-of-the-century miscegenation law preventing couples that are not legally eligible to marry in their own states from getting married in Massachusetts.[243] The majority of states already have Defense of Marriage Acts in their statutory schemes.[244] A number of these statutes make clear that states that have banned same-sex marriage will not recognize same-sex marriages formed in states like Massachusetts.[245] The Federal Defense of Marriage Act of 1996 granted these states the power to ignore same-sex civil marriages formed outside the state, despite the Constitution's requirement of states to give full faith and credit to contracts formed in other states.[246] The Federal Defense of Marriage Act led to a body of law across the country largely unwelcoming to married same-sex couples.[247] Therefore, in addition to having a tenuous future status in

237. *See* Pew Research Center for the People & the Press, Pew Forum on Religion & Public Life: August 2004 News Interest Index (Aug. 24, 2004), *available at* http://people-press.org/reports/print.php3?PageID=875.

238. *Id.*

239. *Id.*

240. Arthur, *supra* note 213.

241. *See* Peterson, *supra* note 189.

242. *Id.*

243. *See, e.g.*, Scott S. Greenberger, *Reilly Says Curb on Gay Marriage Blunts Backlash*, BOSTON GLOBE, July 13, 2004, *available at* http://www.equalmarriage.org/press.php.

244. *See* Peterson, *supra* note 189 (for example, CAL. FAM. CODE § 308.5 (West 2004) states that "[o]nly marriage between a man and a woman is valid or recognized in California."); MINN. STAT. ANN. § 517.03 (West 2004):

> Subdivision 1. General. (a) The following marriages are prohibited: . . . (4) a marriage between persons of the same sex. (b) A marriage entered into by persons of the same sex, either under common law or statute, that is recognized by another state or foreign jurisdiction is void in this state and contractual rights granted by virtue of the marriage or its termination are unenforceable in this state.

Id.

245. *See, e.g.*, ALA. CODE § 30-1-19 (2004); ARK. CODE ANN. § 9-11-208 (2003).

246. *See* Robinson, *supra* note 174.

247. *See* Peterson, *supra* note 189.

Massachusetts, same-sex married couples also risk losing recognition of their union should they decide to move to a different state.

3. Constitutional Amendments

Various states are already taking pre-emptive action against future cases like *Goodridge* by amending their constitutions.[248] In November 2004, the public in eleven states voted for constitutional amendments restricting the definition of marriage to apply only to opposite-sex couples.[249] Additionally, the voters in Missouri passed such an amendment to the state constitution in early August 2004.[250]

The ruling in *Goodridge* sparked a pre-emptive reaction from the federal government.[251] Senator Wayne Allard of Colorado introduced a federal marriage amendment that would ban same-sex marriages but leave room for civil unions.[252] The proposal was the third attempt to pass such an amendment since 2002 and was defeated on July 14, 2004.[253] An ABC News/Washington Post survey of public opinion across the United States about same-sex marriage indicated that more Americans oppose same-sex marriage than support it.[254] However, the poll also showed that most people also oppose a pre-emptive federal constitutional amendment to settle the issue.[255]

4. Colorado

Colorado has a history of rejecting the legislative protection of homosexuals. In the early 1990s, Colorado voters passed an amendment to the state constitution that prohibited state and local governments from enacting any measure to protect homosexuals from discrimination.[256] The Supreme Court struck down the Amendment because it persecuted a specifically targeted group of people and had no rational state interest.[257] Despite this landmark decision, Colorado continues to stifle homosexuals' rights. For instance, Colorado has a statute defining marriage as the

248. *Id.*

249. Peterson, *supra* note 189 (the eleven states are: Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Ohio, Oklahoma, Oregon and Utah).

250. Peterson, *supra* note 189.

251. *See, e.g., Marriage Will Be Defined Nationally—but How?*, USA TODAY, Feb. 17, 2004, *available at* http://www.usatoday.com/news/opinion/editorials/2004-02-17-marriage_x.htm.

252. *Id.*

253. *See, e.g.*, Alan Cooperman, *Gay Marriage Ban in MO May Resonate Nationwide*, WASHINGTONPOST.COM, Aug. 5, 2004, *available at* http://www.washingtonpost.com/wp-dyn/articles/A38861-2004Aug4.html.

254. *See* David Morris & Gary Langer, *Same Sex Marriage: Most Oppose It, but Balk at Amending Constitution*, ABCNEWS.COM, Jan. 21, 2004, *at* http://abcnews.go.com/images/pdf/945a2GayMarriage.pdf.

255. *Id.*

256. *See* Romer v. Evans, 517 U.S. 620, 623–24 (1996).

257. *See id.* at 636.

union between one man and one woman.[258] Moreover, a private non-partisan polling company reported that as of 2003, 56 percent of Coloradoans opposed the legalization of same-sex marriages.[259] While representatives and senators from Colorado have been instrumental in introducing federal marriage amendments to Congress, there was no such amendment on the ballot in Colorado for November 2004.[260]

Because same-sex couples do enjoy a variety of marriage-like benefits in most states, they can afford to bide their time and wait for a favorable political climate to seek recognition of their right to marry through the legislative process. In the end, the backing of the legislature and popular opinion would more likely result in long-term widespread acceptance of same-sex marriages in the United States.

CONCLUSION

Over the last ten years, same-sex couples have launched cases around the country challenging the constitutionality of denying them access to civil marriage.[261] In most states, same-sex couples certainly do not receive benefits under the law equal to those of opposite-sex married couples.[262] However, the goal of equality is not best met through state supreme court decisions in the absence of a socially, politically and economically favorable climate.[263]

Before the court decided *Goodridge*, there was already a trend of victory for same-sex marriage in state court followed by a rush to amend the state constitution, or otherwise permissibly exclude same-sex couples from civil marriage.[264] Not only have these cases inspired voters in the affected states to enact restrictive legislation, but the outcome of the cases has also prompted other states to take pre-emptive legislative ac-

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258. COLO. REV. STAT. § 14–2–104(b) (West 2004).

259. Floyd Ciruli, *Colorado Voters Support Gay Rights but Not Gay Marriage*, CIRULI ASSOCIATES, Dec. 8, 2003, *at* http://www.ciruli.com/polls/gay1203.htm.

260. *See* Peterson, *supra* note 189.

261. *See generally* Brause vs. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Feb. 27, 1998) (concluding marriage statute violated right to privacy provision in Alaska Constitution; superseded by constitutional amendment, article I, section 25 of the Constitution of Alaska); Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); Baker v. State, 744 A.2d 864, 889 (Vt. 1999) (concluding marriage statute violated Vermont Constitution's common benefits clause); *but see* Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003) (marriage statute does not violate liberty interests under either Federal or Arizona Constitution).

262. Robinson, *supra* note 174.

263. *See* Klarman, *supra* note 187.

264. *See* ALASKA CONST. art. I, § 25 (2003); HAW. CONST. art. I, § 23 (2003); *Brause*, 1998 WL 88743, at *4–5 (concluding marriage statute violated right to privacy provision in Alaska Constitution) (superseded by constitutional amendment, art. I, § 25 of the Constitution of Alaska); *Baehr*, 852 P.2d at 68 (concluding marriage statute implicated Hawaii Constitution's equal protection clause; remanded case to lower court for further proceedings); *Baker*, 744 A.2d at 888–89 (resolved by creation of civil unions).

tion against same-sex marriage.[265] Despite this backdrop, same-sex couples brought their action to court instead of using the legislative process.[266]

Although the Massachusetts Constitution is open to the interpretation that the right to choice of marital partner, regardless of gender, is protected,[267] because judges are not elected officials, their decisions to recognize same-sex rights to marry do not necessarily reflect public opinion. Because of the resulting backlash of constitutional amendments that foreclose the possibility of long-term equality for homosexuals,[268] same-sex couples married in Massachusetts are now in limbo, waiting to see if their state will pass an amendment to the constitution invalidating their unions.[269] In the case of same-sex marriage, bad timing and choice of forum may have stunted rather than promoted social change.

Mary Ellen Rayment[*]

265. *See* Peterson, *supra* note 189.

266. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003).

267. *See id.* at 966–67.

268. Peterson, *supra* note 189.

269. *See* B.A. Robinson, Same Sex Marriages in Massachusetts: A Lawsuit: Goodridge v. Department of Public Health. A Proposed Amendment to the Massachusetts Constitution, RELIGIOUS TOLERANCE.ORG, May 29, 2004, *at* http://www.religioustolerance.org/hom_marm.htm.

* J.D. Candidate, May 2006. The author would like to thank Professor Julie Nice and *Denver University Law Review* Comments Editor Sara Lewis for all of their assistance.

BOOK REVIEW

LEARNING FROM *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT*:[1] HOW "JAZZ" AND OTHER INNOVATIONS CAN SAVE OUR SICK PLANET

INTRODUCTION

Red sky at night,

A sailor's delight.

Red sky at morning,

A sailor's warning.

This old mariners' adage has been used for centuries as a simple way to observe environmental signs and warn sailors of dangerous storms. A red dawn is alarming—it signals impending violent weather. *Red Sky at Morning: America and the Crisis of the Global Environment* also is alarming—it warns of catastrophic environmental degradation.[2] The situation is truly urgent. As the author warns: "it is now an understatement to say that we are running out of time."[3]

James Gustave Speth is a professor and dean of the practice of environmental policy and sustainable development at Yale University.[4] Speth founded the World Resources Institute and co-founded the Natural Resources Defense Council.[5] He also served as an environmental advisor for President Carter and President Clinton.[6] Decades of detailed attention to environmental issues make Speth a well-credentialed expert on global health.

His assessment, analysis and admonitions regarding the current environmental crisis are resounding and authoritative. Many world leaders, expert scientists, renowned scholars and other published commentators

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1. JAMES GUSTAVE SPETH, RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT: A CITIZEN'S AGENDA FOR ACTION (2004).

2. *Id.* at xiv. "This volume focuses on the looming disaster and how to avoid it." *Id.*

3. *Id.* at 9.

4. *Id.* at xiii.

5. *Id.* at xi.

6. *Id.* at 2. Former U.S. President Jimmy Carter endorses Speth's work, "[h]is extraordinary new book is an impassioned plea to take these issues seriously before it is too late. We owe it to our children and grandchildren to read *Red Sky at Morning* and take action while we can." *Id.* at back cover.

agree with Speth.[7] These affirmations of his ideas also reiterate his call for immediate and truly influential action.[8] *Red Sky at Morning: America and the Crisis of the Global Environment (hereinafter "Red Sky")* is more than an educated evaluation of the global health crisis—it is an impassioned call to arms and a detailed plan of action.[9]

Unfortunately, the planet is in need of intensive care. As Speth explains, "[m]ajor changes are in order, changes that must be driven by a profound sense of urgency."[10] So take what action? And how? Until now, Speth says, the "primary focus of the international community has been international environmental law, including so-called 'soft law,' the non-binding international policy declarations."[11] Although soft law reflects diplomatic successes,[12] a dire situation calls for stronger laws. The global health crisis needs improved and enforceable international law, but laws are only part of the complex solution for such large problems.[13]

As Speth explains, "efforts to protect the global environment have largely failed in the sense that the trends in environmental deterioration have not improved and that more of the same will not get us where we want to be in time to head off an era of unprecedented environmental decline."[14] Tangible—and desperately needed—solutions will require unconventional approaches, innovative ideologies and shifts in cultural paradigms.[15] *Red Sky* warns: "we need very different international institutions, procedures, and core understandings."[16]

Part I of this Book Review considers the impacts of the twentieth century's explosions in population and technology. Part II investigates the most pressing current environmental issues and their causes. Part III contemplates solutions, considering economic incentives and sustainable

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7. Throughout this paper, the author will reference the views of other scholars whose work reinforces Speth's concerns about global environmental health. Investigation into the issues Speth has addressed finds the majority of experts in agreement with Speth's assessment.

8. SPETH, *supra* note 1, at 95. "[T]he threatening environmental trends highlighted a quarter-century ago have continued, so that today the problems are deeper and more urgent." *Id.*

9. *Id.* at 203. *Red Sky*'s final section is a detailed blueprint for individual activism entitled "Resources for Citizens." *Id.*

10. *Id.* at 9.

11. *Id.* at 91.

12. LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER viii (2d ed., West Group 1999). "Although not binding, [soft laws] nevertheless provide the basis for voluntary cooperation, which enables the action processes to proceed, and paves the way for negotiation of binding agreements." *Id.*

13. SPETH, *supra* note 1, at xii. "The current system of international efforts to help the environment simply isn't working. The design makes sure it won't work, and the statistics keep getting worse. We need a new design, and to make that happen, civil society must take the helm." *Id.*

14. *Id.* at xi.

15. *Id.* at 171. "Many solutions to today's environmental challenges lie outside the established 'environmental sector.' Environmental objectives now need to be incorporated into corporate planning, energy strategy, technology policy, R & D funding, tax policy, international trade and finance, development assistance, and other matters that once seemed far removed." *Id.*

16. *Id.* at 173.

development. Also, Part III outlines Speth's eight transitions to global sustenance.

Part IV explores the far-reaching implications of Speth's directive to rethink and reform culture and consciousness. This reformation incorporates innovative theories from postmodern philosophy, Eastern traditions, socio-economics, psychology, literature, and feminism (in its various forms). Throughout Part IV, and also throughout *Red Sky*, a new paradigm of dialectic synthesis, cooperation, reconciliation and inclusion emerges. Finally, Part V considers how Speth's new consciousness could impact the legal world.

I. FROM TELEGRAPHS TO TEXT MESSAGING: IMPACTS OF THE TWENTIETH CENTURY'S EXPLOSIONS IN POPULATION AND TECHNOLOGY

> *Preceding generations have presented us with a highly developed science and technology, a most valuable gift which carries with it possibilities of making our life free and beautiful to an extent no previous generation has enjoyed. But this gift also brings with it dangers to our existence as great as any that have ever threatened it.*[17]

A. Assessing Global Environmental Health Reveals a World of Wounds[18]

Author and biologist Aldo Leopold noticed by the mid-twentieth century that profound changes were overtaking the natural world.[19] By 1900, all of human history had produced a global population of one and a half billion people. However, the twentieth century facilitated an enormous population explosion—there are now six billion people on earth.[20] Leopold and other environmentalists have tracked the drastic impacts of population explosion. Speth outlines four major concerns that have resulted from this massive human expansion and its accompanying changes in culture and technology.[21] Section A considers the increase in population and recent globalization, the expansive nature of these changes, and ultimately the ethical consequences of growth and change. Section B addresses the implications—for good and for ill—that technological advancements have for the future of environmental health.

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17. ALBERT EINSTEIN, IDEAS AND OPINIONS 93–94 (Crown Publishers 1954).

18. SPETH, *supra* note 1, at 13 (citing ALDO LEOPOLD, A SAND COUNTY ALMANAC: WITH OTHER ESSAYS ON CONSERVATION FROM ROUND RIVER 165 (Oxford University Press 1966)). "[O]ne of the penalties of an ecological education is that one lives alone in a world of wounds." *Id.*

19. *Id.* at 15.

20. *Id.* at 13.

21. *Id.* at 13-22.

1. Concern #1: A Rapidly Expanding Population on a Finite Planet[22]

Speth's first concern is the seemingly limitless growth of people in a limited world. Population growth and improved standards of living have come at the expense of the environment.[23] Millions more people radically increase consumption and pollution, which are destroying the natural world.[24] A growing number of consumers are ferociously devouring resources.[25] While industrial and human wastes have massively increased, technological advances have created new hazards, such as toxic and radioactive waste.[26]

The earth's atmosphere now has increased levels of greenhouse gases, causing global warming and depletion of the planet's stratospheric ozone layer.[27] Also, the oceans and fresh water habitats are being destroyed.[28] Environmental degradation in the twentieth century also has threatened the biodiversity of plant and animal species. As scientist Stuart Primm explains, "the rate of species extinction today is estimated to be a hundred to a thousand times the normal rate at which species [naturally] disappear."[29]

2. Concern #2: Globalization: Interdependent International Megasytems

Second, the expansion of the twentieth century has globalized economic and environmental issues. The problems that Speth outlines in *Red Sky* are world-wide.[30]

New institutions such as the European Union and the World Trade Organization wield enormous power and are creating a hugely interdependent global economy.[31] Yet, there is no "World Environmental Pro-

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22. *Id.* at 17. Speth quotes a convention of 1,500 preeminent scientists, the majority of whom are Nobel laureates:

> The earth is finite. Its ability to absorb wastes and destructive effluents is finite. Its ability to provide food and energy is finite . . . Current economic practices which damage the environment, in both developed and underdeveloped nations, cannot be continued without the risk that vital global systems will be damaged beyond repair.

Id.

23. *Id.* at 119. "Our economic activity, in the largest sense, is consuming nature and pouring out products and pollution." *Id.*

24. *Id.*

25. Susan Headden, *A Heavy Footprint*, U.S. NEWS & WORLD REPORT, July 6, 2004, at 4. "[W]e are sapping our resources at a ferociously gluttonous pace." *Id.*

26. SPETH, *supra* note 1, at 46. "Paralleling the dramatic growth in the volume of older pollutants . . . has been the introduction since World War II of new chemicals and radioactive substances." *Id.*

27. *Id.* at 16.

28. *Id.*

29. SPETH, *supra* note 1, at 15 (citing Stuart L. Primm et al., *The Future of Biodiversity*, SCIENCE 269, 347 (1995); J.H. LAWTON AND R. M. MAY, EXTINCTION RATES 73 (1995)).

30. SPETH, *supra* note 1, at 15-22.

31. RICHARD FALK, REVITALIZING INTERNATIONAL LAW 5 (1989). Falk explains the ironic movement, after centuries of bloodshed to separate and autonomize individual nations, back toward

tection Agency" with anything approaching the power or budget to address the looming crisis.[32]

Though humans separate themselves into different cultures, languages and ethnicities, the environmental impact of unchecked atmospheric alteration transcends nationalities and sovereign states.[33] As Speth explains: "[a]ddressing environmental concerns means thinking beyond states, nations or even continents."[34]

Environmental crisis can quickly lead to political and social crisis.[35] As we face a brave new world of international trade, we also confront planet-wide pollution and drastic climate alterations.[36] As the problems grow, we will need correspondingly larger solutions to prevent humanitarian disasters.

3. Concern #3: Growth Facilitates More Growth[37]

A third consequence of the twentieth century's economic growth is its snowballing, expansive effect. Speth explains, "the world economy's forward momentum is large."[38] More people seeking improved quality of life means a greater draw on resources.[39] One of the scarcest, but most essential, of these natural resources is water.[40]

Speth explains, "[c]ollectively the environmental impacts of rich and poor have mounted as the world economy has grown, and we have

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control under one central power: "The seventeenth century completed a long process of historical movement from nonterritorial central guidance toward territorial decentralization, whereas the contemporary transition process seems headed back toward nonterritorial central guidance." *Id.*

32. SPETH, *supra* note 1, at 177. "Over the past decade, the leaders of France, Germany, and other countries have called for the creation of a World Environment Organization." *Id. See also* Sir Geoffrey Palmer, *New Ways to Make Environmental Law*, 86 AM. J. INT'L L. 259, 260 (1992). Sir Geoffrey Palmer, P.C., K.C.M.G., A.C., is a former Prime Minister, Deputy Prime Minister, Attorney General and Minister for the Environment of New Zealand. "In truth, the United Nations lacks any coherent institutional mechanism for dealing effectively with environmental issues." *Id.* at 260. *See also infra* Part V for a discussion of global environmental governance.

33. SPETH, *supra* note 1, at 193. THE EARTH CHARTER is a product of the Rio Summit and now endorsed by "725 organizations representing 40 million people." *Id.* Speth calls it "[t]he most sophisticated effort to date to frame values and principles for a sustainable future." *Id.* THE EARTH CHARTER recognizes that, "[a]s the world becomes increasingly interdependent and fragile, the future at once holds great peril and great promise. To move forward we must realize that in the midst of a magnificent diversity of cultures and life forms we are one human family and one Earth community with a common destiny." *Id.* at 194.

34. SPETH, *supra* note 1, at 178. Speth maintains that we need "globalize[d] environmental protection in a world where pollution knows no boundaries and where trade, deployment of technology, and investment flows are increasingly international." *Id.*

35. *Id.* at 61. "Within societies, the disruption of water supplies or agriculture, as well as rising sea levels and other impacts, could easily contribute to social tensions, violent conflicts, humanitarian emergencies, and the creation of ecological refugees." *Id.*

36. *Id.* at 73. "[T]he more serious pollution problems are chronic, insidious, and global." *Id.*

37. *Id.* at 18. "[T]here is no reason to think that the world economy will not double and perhaps double again within the lifetimes of today's young people." *Id.*

38. *Id.* at 17.

39. *See id.* at 19.

40. *Id.* at 18. *See also infra* notes 117-24 and accompanying text for a discussion of the global fresh water crisis.

not yet deployed the means to reduce the human footprint on the planet faster than the economy expands."[41]

4. Concern #4: New Global Ethical Responsibilities[42]

Speth's final concern about the consequences of the twentieth century is a product of the first three: with humanity's ability to radically alter the global environment comes an ethical responsibility to sustain it.[43] Innovative environmentalist Aldo Leopold said, "[a] thing is right when it tends to preserve the integrity, beauty and stability of the biotic community."[44]

As Speth explains, environmental ethics promote "the protection for their own sake of the living communities that evolved here with us and our trusteeship of the earth's natural wealth and beauty for generations to come."[45]

Speth insists that action is urgently needed to preserve the living systems that have been entrusted to us.[46] He defines the new ethic: "Our responsibility is to manage ourselves and our impacts on nature in a way that minimizes our interference with the great life-support systems of the planet."[47] This will require increasing the effectiveness of international law,[48] as well as finding unconventional new solutions.[49]

As worldwide society progresses through the twenty-first century, it must address the twentieth century's problems of rapid population growth and expansive globalization. Formulating and implementing a new, earth-centered ethic is both the consequence of and a responsibility for the increasing global citizenry.

B. The Impact of the Twentieth Century's Technological Revolution

Technological knowledge can mean advancement, sophistication and positive change.[50] However, some technologies, such as fossil fuel combustion, have huge negative side effects.[51] As Speth points out: "Al-

41. SPETH, *supra* note 1, at 19.

42. *Id.* at 24. "If we have rights, nature must also. The life that evolved here with us should be allowed to live 'as a matter of biotic right.'" *Id.* (quoting ALDO LEOPOLD, A SAND COUNTY ALMANAC 211 (Oxford University Press 1949)).

43. *Id.* at 15-17.

44. *Id.* at 24.

45. *Id.* at 192.

46. *Id.* at 9. "[I]t is now an understatement to say that we are running out of time." *Id.*

47. *Id.* at 20.

48. *See id.* at 96. "But the bottom line is that on the big issues the trends of deterioration continue. With few exceptions, our instrument of choice, international environmental law, is not yet changing them, and the hour is late." *Id.*

49. *See infra* Part IV for a discussion of unconventional solutions.

50. SPETH, *supra* note 1, at 129. "Our society has encouraged technological virtuosity, equating it with progress." *Id.*

51. *See id.* at 44. "[T]he buildup of vast quantities of excess carbon dioxide from fossil fuel use and other sources now threatens to alter the planet's climate and disrupt both ecosystems and

though the social costs of industrial innovation have often been considerable, the material benefits have been irresistible."[52]

Because infantile technologies and their far-ranging side effects cannot always be predicted or controlled, new technology is a potential Pandora's Box.[53] Speth explains that the problem "is not that technology is bad for the environment and social goals per se, but that . . . societies have been largely unable to assess new technologies and direct technological change in ways that avoid huge environmental costs."[54]

Certainly the volumes of new industrial byproducts—biohazards, toxics and radioactive materials—make speculative new technology a threat to the environment.[55] For example, as many as 400,000 people were injured (including 10,000 deaths) in 1984 when methyl isocyanate, an extremely toxic gas, leaked from a Union Carbide pesticide plant in India.[56]

However, new technologies also can be a big part of environmental solutions.[57] If we can develop ourselves into technological problems, hopefully we can develop ourselves through the problems to a brighter and cleaner future.

II. WHAT ARE WE DOING TO THE NATURAL WORLD?

> *As we begin the new century, human activities are disrupting the great ecological systems and natural cycles that make our planet habitable, bountiful, and wondrous. Only our heightened care can save the world as we know it. So, the world is indeed in our hands, for good or for ill.*[58]

It is always essential to dissect and assess a problem before attempting to solve it. Speth uses his own expertise and the most recent findings of experts in various fields to outline the primary problems of global

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human communities." *Id.* As a consequence of petroleum combustion engines, "the United States is responsible for 30 percent" of global greenhouse gas accumulation. *Id.* at 61.

52. *Id.* at 129.

53. *See id.* at 127. Speth quotes then President Nixon, who was touring a nuclear power plant: "We can't be sure what it is going to produce, but on the other hand, we know that by exploring the unknown, we are going to grow and progress . . . . [I]n terms of nuclear power, we must not be afraid." *Id.* at 129. This sort of naïve risk-taking takes on new and tragic irony after the Chernobyl nuclear accident, which "caused the first officially reported radiation deaths in a nuclear-power-plant accident." WILLIAM R. SLOMANSON, FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW 586 (4th ed., Thompson West 2003).

54. SPETH, *supra* note 1, at 127.

55. *Id.* at 127-130.

56. SLOMANSON, *supra* note 53, at 585. *See also In re* Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 844–45 (S.D.N.Y. 1986) (dismissing the Indian victims' suit: "The doctrine of forum non conveniens allows a court to decline jurisdiction . . . . [T]he foreign plaintiffs' choice of the United States forum 'deserves less deference' than would be accorded a United States citizen's choice.").

57. *See infra* notes 168-70 and accompanying text for a discussion of technology as a solution.

58. SPETH, *supra* note 1, at x.

health. Pollution and resource depletion have drastically affected the planet, from the stratospheric ozone layer to the depths of the oceans—and the air, land and water in between.[59]

A. Pollution

Pollution is a fundamental cause driving global deterioration.[60] Unfortunately, Speth explains that recent prosperity has caused "vast increases in the quantity of pollutants imposed on a finite environment."[61]

Earth is being asked to tolerate air pollution,[62] toxics,[63] excessive nitrogen,[64] phosphorous,[65] and carbon dioxide,[66] radioactive waste,[67] acid rain and water body acidification,[68] atmospheric ozone,[69] human wastes[70] and other pollution. As the list of problems in the following sections illustrate, expecting the planet to absorb all of these pollutants is an impossible task. As Speth explains, "the more serious pollution problems are chronic, insidious, and global."[71]

B. Greenhouse Gases and Climate Change

When the recent Bush administration rejected controls on greenhouse emissions through the Kyoto protocol,[72] it commissioned a study from the National Academy of Sciences (NAS), hoping to show that human activity is not drastically disrupting the global climate.[73] However, the NAS study did not support the Bush stance and instead reiterated environmentalists' alarm.[74]

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59. *See id.* at 23. Speth contends that "[t]he two megatrends in environmental deterioration are increasing pollution and biological impoverishment." *Id.* "Biotic impoverishment" is caused by "human appropriation and consumption of natural resources and . . . pollution." *Id.* at 119.

60. *See id.* at 58.

61. *Id.* at 45.

62. *Id.* at 44.

63. *Id.*

64. *Id.* at 71-73.

65. *Id.* at 43-44.

66. *Id.* at 63-69.

67. *Id.* at 14.

68. *Id.* at 44-46, 51-54.

69. *Id.* at 54-55.

70. *Id.* at 51. "[W]ater contaminated by human wastes is one of the biggest killers in the developing world." *Id.*

71. *Id.* at 73.

72. *Id.* at 55. "[T]he Kyoto Protocol would require that, around 2010, industrial countries reduce their greenhouse gas emissions to a level, on average, at least 5 percent below what those emissions were in 1990." *Id.*

73. *See id.* at 55-56. "The Bush administration itself recently published a climate-change report containing some of the strongest statements to date from the U.S. government about how the world is getting hotter and the burning of fossil fuels is adding to the problem." *Globe Warms; Bush Fiddles*, DENV. POST, July 14, 2002, at F1.

74. SPETH, *supra* note 1, at 56. The NAS study found that human activity is increasing greenhouse gases, causing global temperatures to rise. *Id.* Temperature increase and sea-level rise will continue into the twenty-first century and beyond. *Id.* Also, "[g]lobal warming could well have serious adverse societal and ecological impacts by the end of this century . . . ." *Id.* (citing NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY

Carbon dioxide is a by-product of fossil fuel combustion and a greenhouse gas.[75] Increased levels of greenhouse gases are causing global warming, which is causing planet-wide problems, including widespread glacial melting.[76] Polar ice melting causes sea levels to rise and may alter the Gulf Stream, resulting in catastrophic weather shifts.[77]

Many scientists believe, as Speth explains, that "The most likely mechanism for abrupt climate change is disruption of ocean currents such as the Gulf Stream."[78] Gulf Stream changes will impact the entire Northern Hemisphere, and all its inhabitants, with violent and drastic shifts in the weather.[79]

This is but one of a myriad of consequences that will result from global climate change. Speth delivers the grim forecast: many experts predict that without major corrections by the end of the twenty-first century, it will be "impossible for about half of the American land to sustain the types of plants and animals now on that land."[80] For example, the leafy trees that characterize New England—and its colorful autumns—may soon disappear.[81]

C. Loss of Ecosystems and Productive Lands

Illustrating the complex interactions of global ecology are problems of biological impoverishment.[82] Biological impoverishment is both a result of environmental degradation and a cause of other harms.[83] Speth explains the ramifications, as forces behind "biotic impoverishment are

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QUESTIONS (National Academy Press 2001)). *See also* Kevin E. Trenberth, *Stronger Evidence of Human Influences on Climate: The 2001 IPCC Assessment*, 43 ENV'T 8 (2001).

75. SPETH, *supra* note 1, at 3.

76. *Id.* at 58-59. *See also* Tim Apenzeller & Dennis R. Dimick, *Global Warming: Bulletins from a Warmer World*, NATIONAL GEOGRAPHIC, Sept. 2004, at 12. "From the Arctic to Peru, from Switzerland to the equatorial glaciers of Irian Jaya in Indonesia, massive ice fields, monstrous glaciers, and sea ice are disappearing, fast." *Id.*

77. SPETH, *supra* note 1, at 60.

78. *Id.* (citing Robert B. Gagosian, *Abrupt Climate Change: Should We Be Worried?*, WOODS HOLE OCEANOGRAPHIC INSTITUTION, Jan. 27, 2003, at 8). Global warming is melting arctic ice caps, increasing fresh water in the Atlantic. *Id.* at 61. This dramatic "freshening" of the ocean could "both block the Gulf Stream's release of heat and disrupt the ocean currents that pull the warm waters of the stream northward." *Id.* Disruptions in the Gulf Stream will result in drastic weather disasters throughout the Northern Hemisphere. *Id.* at 60-61.

79. *Id.* at 61. "Today's computer models suggest that a shutdown of the Gulf Stream would produce winters twice as cold as the worst winters on record in the eastern United States." *Id.* at 60-61.

80. *Id.* at 16 (citing J.R. MALCOLM & L.F. PITELKA, ECOSYSTEMS AND GLOBAL CLIMATE CHANGE: A REVIEW OF POTENTIAL IMPACTS OF U.S. TERRESTRIAL ECOSYSTEMS AND BIODIVERSITY 11 (2000)).

81. *Id.* at 58. "[E]cological modeling show[s] that climate change in the second half of this century, if it is not slowed, will largely eliminate maple trees and the maple sugar industry from New England." *Id.* (citing NATIONAL ASSESSMENT SYNTHESIS TEAM, CLIMATE CHANGE IMPACTS ON THE UNITED STATES: OVERVIEW 45 (2000); REPORT OF THE NEW ENGLAND REGIONAL ASSESSMENT GROUP, PREPARING FOR CLIMATE CHANGE: NEW ENGLAND REGIONAL OVERVIEW 39-42 (2001)).

82. *See id.* at 30-33.

83. *See id.* at 30.

operating on a global scale, stressing natural systems, homogenizing and simplifying them, and reducing biological diversity at a rate and scale not experienced for millions of years."[84] Biotic impoverishment reveals itself in the problems of deforestation and desertification.

1. Deforestation

One of the problems closely linked to air quality, global warming, and biodiversity is deforestation.[85] Trees and other fauna inhale carbon dioxide and exhale oxygen.[86] Forests also hold large amounts of carbon while they are alive, but carbon is released as harmful greenhouse gases when trees die or are burned.[87]

In a recent article, Brian Kelly and Mark London evaluated the problems of deforestation in the Amazon region. The Amazon River Basin "is 80 percent the size of the continental United States and contains a fifth of the world's fresh water."[88] Its rainforests are "home to the planet's greatest storehouse of biodiversity."[89] Brazil, the largest of the Amazon nations, is also home to 60 to 90 million people who are living in poverty.[90] One expert on Amazonian preservation has said, "The main thing to save the forest is to keep the people out."[91] But the economic temptation to convert forests to farm and ranch lands is great.[92]

Assisting in the exploitation and annihilation of the world's forests is a global economy and loss of local control over local resources.[93] Conversely, a solution to deforestation presented by authors Roger Stone and Claudia D'Andrea would be "allocating responsibility for managing and

84. *Id.* at 33. The nine drivers of biotic impoverishment are land use conversion (i.e., development), land degradation, freshwater shortages, watercourse modification, invasive species, over harvesting, climate change, ozone depletion, and pollution. *Id.* at 30-33.

85. *Id.* at 36.

86. GURUSWAMY, *supra* note 12, at 1093. "Forest vegetation converts CO2 to oxygen (O2) in the presence of sunlight during photosynthesis." *Id.*

87. *See* Betsy Carpenter, *The Deep-Six Fix*, U.S. NEWS & WORLD REPORT, July 6, 2004, at 24-25 for a discussion of carbon and the prospects for carbon sequestering, naturally in forests or artificially through expensive and uncertain new technologies.

88. Brian Kelly & Mark London, *Home on the Tropical Range*, U.S. NEWS & WORLD REPORT, July 6, 2004, at 76.

89. SPETH, *supra* note 1, at 36.

90. Kelly & London, *supra* note 88, at 76.

91. *Id.* at 75 (quoting Phil Freanside, a scientist at the National Institute for Amazonia Research in Manaus).

92. *Id.* at 76. Brazilian developer Blairo Maggi explained, "It's very easy to defend the Amazon on the beaches of Rio or in the offices of Washington or London. But our families need jobs and homes." *Id.*

93. SPETH, *supra* note 1, at 40. "Critics of globalization charge that economic globalization and the World Trade Organization [WTO] are magnifying the trend toward expanded logging by encouraging high levels of foreign investment, weaker domestic regulation in the face of international competition, and loss of local community controls." *Id. See also* Jim Carlton, *'Greens' Target WTO's Plan for Lumber: Push to End Tariffs Could Intensify Logging in Old Forests*, WALL ST. J., Nov. 24, 1999, at A2.

protecting forests to the local groups and communities that depend on their healthy survival . . . ."[94]

If the underlying problems of population and poverty are addressed, local controls and the help of international financial aid could slow or even stop deforestation.[95] After evaluating a United Nations study, Speth optimistically concludes, "[W]e should be able to find a way to save the world's ancient, intact forests."[96]

2. Desertification

Another threat to global health is desertification. Loss of vegetation increases carbon dioxide levels.[97] In turn, greenhouse warming threatens soil fertility, increases wind and water erosion, and may further destroy the plants that prevent soil loss.[98] As Speth explains, "The productivity of crop and grazing land is threatened by water and wind erosion, by the salinization and waterlogging of irrigated lands, and by overgrazing and devegetation."[99]

Desertification can lead to massive dust storms, like those that ravaged the Midwest in the 1930s and lead to the nickname "the Dust Bowl."[100] Years of drought in northwest China have created huge dust clouds.[101] As one journalist recently observed, "The dust storms that blow up each spring can sweep east across the Korean peninsula and Japan, eventually reaching across North America."[102]

Desertification, like deforestation, must be addressed in terms of its underlying causes if we are to prevent humanity's transformation of fertile, productive and living ecosystems into barren wastelands.[103]

D. Loss of Protective Ozone in the Earth's Atmosphere

Ozone in the lower atmosphere in high levels or as a component of smog can be harmful to human health.[104] Yet, as Speth explains, "ozone

94. SPETH, *supra* note 1, at 40 (citing ROGER D. STONE & CLAUDIA D'ANDREA, TROPICAL FORESTS AND THE HUMAN SPIRIT: JOURNEYS TO THE BRINK OF HOPE 5 (2001)).

95. Kelly & London, *supra* note 88, at 76-77.

96. SPETH, *supra* note 1, at 41 (citing *An Assessment of the Status of the World's Remaining Closed Forests*, U.N. Environmental Programme, U.N. Doc. UNEP/DEWA/TR 01-2 (2001)).

97. See *supra* notes 85-87 and accompanying text for a discussion of plant life and carbon.

98. SPETH, *supra* note 1, at 16-17, 56-57.

99. *Id.* at 31.

100. H.E. DREGNE, DESERTIFICATION OF ARID LANDS 203 (Adli Bishay & William G. McGinnies eds., Harwood Academic Publishers 1983).

101. Jasper Becker, *China's Growing Pains: More Money, More Stuff, More Problems. Any Solutions?*, NAT'L GEOGRAPHIC, March 2004, at 68, 80. *See also* Ann Schrader, *Latest Import from China: Haze*, DENV. POST, April 18, 2001, at A1. A dust cloud "several miles thick" traveled from China to Colorado in the spring of 1999, and scientists believe that increasing standards of living in China will only bring more desertification, pollution, and dust. *Id.* at A10.

102. Becker, *supra* note 101, at 80.

103. SPETH, *supra* note 1, at 30-33.

104. *Id.* at 54.

is a valuable component of the upper atmosphere, where it acts as a filter, absorbing harmful wavelengths of ultraviolet radiation."[105]

Widespread use of chlorofluorocarbons (CFCs) in the twentieth century created a hole in the protective ozone layer "roughly the size of Russia and Brazil combined."[106] However, swift international action has made ozone a rare but exemplary environmental success.[107]

E. Threatened and Endangered Species and the Importance of Biodiversity

Biodiversity is a relatively modern concept that refers to aspects of animal populations, independent of their numbers as they can exist in isolation, like in a zoo. As the World Resources Institute explains, the three aspects of biodiversity represent "the variety of genetically distinct populations within a given species; the ten million or so species of plants, animals and micro-organisms; and the diversity of ecosystems of which species are functioning parts."[108] Genetic diversity is essential to species' survival.[109]

In 1982, Harvard professor E.O. Wilson testified before the U.S. Congress on the Endangered Species Act:

> The worst thing that can happen during the 1980s is not energy depletion, economic collapse, limited nuclear war, or a conquest by a totalitarian government . . . .[110] The one process ongoing in the 1980s that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly our descendants are least likely to forgive us.[111]

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105. *Id.*

106. *Id.* at 54-55.

107. *Id.* at 55. The Montreal Protocol, designed to restore the ozone layer, is a promising model of international cooperation: "With the cooperation of developing nations, scientists estimate that the ozone layer could fully recover by mid-century." *Id.* Speth calls the Montreal Protocol "the crowning achievement of global environmental governance." *Id.* at 95.

108. *Id.* at 25 (citing WORLD RESOURCES INST., ET AL., GLOBAL BIODIVERSITY STRATEGY GUIDELINES FOR ACTION TO SAVE, STUDY, AND USE EARTH'S BIOTIC WEALTH SUSTAINABLY AND EQUITABLY (1992)).

109. For example, cheetahs have become a poster child for biodiversity. *See Why Does the Cheetah Lack Genetic Diversity?*, Cheetah Conservation Fund, *at* http://www.cheetah.org/?nd=aboutcheetah-03 (last visited Apr. 14, 2005). While cheetahs exist in sufficient numbers and breeding pairs, the fragile genetic combination that creates this speedy cat does not. *Id.* Geneticists have shown that lack of genetic diversity within the cheetah community make the species especially vulnerable to disease and birth defects. *Id.* The small breeding stock is most likely doomed, because the genetic diversity within the cheetah species has already been lost. *Id.*

110. SPETH, *supra* note 1, at 24 (quoting E.O. Wilson, GAIA: AN ATLAS OF PLANETARY MANAGEMENT, 159 (Norman Myers, ed., Anchor Books/Doubleday 1984) ("As terrible as these catastrophes would be for us, they can be repaired within a few generations.").

111. *Id.* (quoting E.O. Wilson, GAIA: AN ATLAS OF PLANETARY MANAGEMENT 159 (Norman Myers, ed., Anchor Books/Doubleday 1984)).

Some conservationists are motivated by emotional and spiritual connections to the ailing natural world.[112] However, Speth looks past sentiment to outline two reasons biodiversity is important: "our ethical responsibilities and ecosystem services."[113] If humanity cannot be motivated by an ethical duty, pure self-interest will also support protection of biodiversity. The wealth of goods and services the environment provides, from resources such as trees and fish to services like pollination and photosynthesis, makes it beneficial, lucrative and in humanity's self-interest to preserve biodiversity.[114]

F. Water

Water is everywhere, but not in limitless quality and quantity.[115] Considering the sad state of global health, it is not surprising to discover that the planet's largest component—water—is also ailing. Earth's vast fresh and salt water ecosystems are both threatened today.[116]

1. Fresh Water Scarcities

As population, pollution and global temperatures increase, the demand for fresh water also will rise. Speth finds that "[a]ppropriation of freshwater supplies is . . . extensive, with widespread devastation of freshwater habitats."[117]

Water already is scarce in much of the world. Speth reports, "40 percent of the world's people [are] living in countries that suffer from serious water shortages."[118] The chief news editor at *Nature* magazine gave the grim forecast: "The water crisis is real. If action isn't taken, millions of people will be condemned to a premature death."[119] Already, Speth notes, "water contaminated by human wastes is one of the biggest killers in the developing world."[120]

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112. STEPHEN R. KELLERT, KINSHIP TO MASTERY: BIOPHILIA IN HUMAN EVOLUTION AND DEVELOPMENT 12 (Island Press 1997). As Kellert explains, there are aesthetic values inherent in nature: "living diversity is still an unrivaled contest for engaging the human spirit of curiosity, exploration and discovery, in an almost childlike manner." SPETH, *supra* note 1, at 28.

113. SPETH, *supra* note 1, at 28.

114. Michael Satchell, *Trouble in Paradise*, U.S. NEWS & WORLD REPORT, July 6, 2004, at 70, 70. The benefits of biodiversity are often termed in the "cure for cancer" argument. *Id.* "Some 40 percent of pharmaceuticals are derived from vascular plants, yet only a mere 2 percent of the 300,000 known flora that contain sap have been screened for their medicinal value. The elusive cure for cancer could lie in a tree, flower, or shrub, but what if that species is lost?" *Id.*

115. GURUSWAMY, *supra* note 12, at 578. "[A]ll too characteristically, humanity shows an astonishing disregard for maintaining the health of the hydrosphere—seemingly oblivious to the fact the total amount of water in the world is constant, neither to be increased (like timber or fish) nor to be diminished (like petroleum or coal)." *Id.*

116. SPETH, *supra* note 1, at 18, 85-86.

117. *Id.* at 16.

118. *Id.* at 32. (citing U.N. ENVIRONMENTAL PROGRAMME, GLOBAL ENVIRONMENTAL OUTLOOK 3: PAST, PRESENT AND FUTURE PERSPECTIVES 150 (Earthscan 2002)).

119. Peter Aldhous, *The World's Forgotten Climate*, 422 NATURE 251, 251 (2003).

120. SPETH, *supra* note 1, at 51.

Professor William Slomanson has found that "[s]ome experts also believe that acquisition of water and water rights will soon become major sources of international conflict."[121] Impoverished and suffering regions, already riddled with political strife, may become embroiled in a life-or-death struggle for potable water.

The United States is already facing a fresh water crisis,[122] especially in the arid west.[123] Recent drought has foreshadowed the inevitable conflicts that will come with an increase in western United States populations. As Interior Secretary Gail Norton predicts, "The drought is a warning signal . . . Water shortages will be repeated even in average rainfall years because there's simply not enough supply to satisfy all the growing demands."[124]

2. Threats to the Health of the Oceans[125]

The world's oceans are home to complex and diverse ecosystems. But they also receive most of the world's wastes.[126] Unfortunately, pollution[127] and global warming[128] are taking a huge toll on the planet's hydrosphere.

Giant regions of oceanic ecosystems are going extinct. Speth gives the bad news: "Industrial processes such as manufacture of fertilizers and other human activities . . . [have created] at least fifty dead zones in the oceans, one the size of New Jersey in the Gulf of Mexico."[129]

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121. SLOMANSON, *supra* note 53, at 586.

122. Marianne Lavelle & Joshua Kurlantzick, *The Coming Water Crisis*, U.S. NEWS & WORLD REPORT, July 6, 2004, at 58-63. Former EPA Administer Christie Todd Whitman warns that the quality and quantity of water is "the biggest environmental issue that we face in the 21st century." *Id.* at 58.

123. *Id.* at 61. Aging aqua structures throughout the country, not only in the west, are in need of repair and many municipal drinking water supplies contain high levels of contaminants. *Id.* at 58.

124. Alex Markels, *The War Over Water*, U.S. NEWS & WORLD REPORT, July 6, 2004 at 64. Mark Twain is quoted saying that in the West, "whiskey is for drinking; water is for fighting over." *Id.* Conflicts are already arising: conservationists, developers, farmers and ranchers, industries and others are vying for a finite and unpredictable resource. *Id.* at 64-66.

125. SPETH, *supra* note 1, at 16, 18-19, 52-54, 56-60.

126. GURUSWAMY, *supra* note 12, at 578. "Most of the world's wastes—some twenty billion tons a year—end up in the sea, commonly without preliminary processing, usually to remain for years in coastal waters where they impair productive breeding grounds and pollute beaches." *Id.*

127. SPETH, *supra* note 1, at 16. *See also* Thomas Hayden, *Trashing the Seas*, U.S. NEWS & WORLD REPORT, July 6, 2004 at 48, 48-49. Activist Charles Moore has observed "countless tons of plastic refuse . . . drifting on the high seas." *Id.* at 48. Japanese scientists have found that plastic particles at sea act like a sponge for toxic chemicals, absorbing and concentrating them. *Id.* Plastic particles, which float on the ocean's surface, "often end up in the ocean's drifting, filter-feeding animals, like jellyfish." *Id.* Many species, (including humans) feed on jellyfish. *Id.* As Moore explains: "That's not likely to be good." *Id.*

128. See *supra* notes 75-80 and accompanying text for a discussion of oceanic freshening and glacial melting.

129. SPETH, *supra* note 1, at 16 (citing JANE LUBCHENCO, *Waves of the Future: Sea Changes for a Sustainable World, in* WORLDS APART: GLOBALIZATION AND THE ENVIRONMENT 25 (James Gustave Speth ed., 2003); C. Yoon, *A "Dead Zone" Grows in the Ocean*, N.Y. TIMES, 20 January 1998, at F1).

The bad news gets worse as Speth continues: "Coral reefs and the life on them are now at great risk due to the combined impacts of coastal development and pollution, tourism, global warming, and destructive fishing practices."[130] Coral reefs are sensitive ecosystems and the freshening of seawater because of glacial melting, plus the effects of warmer surface and ocean temperatures, threaten to destroy them entirely.[131] The forecasts are grim, and as Speth elaborates: "Indeed, painful to say, some observers believe that most of the world's coral reefs are already doomed."[132] Even if all precautions to curb greenhouse gas emissions are taken immediately, it is unlikely that we can prevent the subtle increase in temperatures that scientists fear will cause coral bleaching and reef extinction.[133]

Speth's urgent cry for quick actions is widely substantiated by the scientific data available. Indeed, investigation of the most recent scholarship reveals an unhealthy planet with a bleak future. However, because human activity is behind the pervasive destruction of the Earth's environment, it logically follows that human activity is the only force that can reverse the decline. An understanding of the multi-faceted problems points to a variety of solutions.

As a global community, we read the reports and realize that we *can* change our habits, from decimation of nature to preservation of nature.[134] New ethics show us that we *should* change.[135] But the underlying question upon which the future of life as we know it rests—*will* we change?—is up to us to decide.

III. IS PROFITABLE, YET SUSTAINABLE, DEVELOPMENT THE SOLUTION? CAN THE INCENTIVES FOR EXPLOITATION ($) = THE INCENTIVES FOR CONSERVATION ($)?

What good is money if you can't breathe the air? [136]

If money-making is behind our inefficient exploitation of global resources, will the potential for financial loss through resource exhaustion motivate a change in our ways? Proponents of sustainable development

130. SPETH, *supra* note 1, at 34. *See also* Jerry Hirsch, *Study: Coral Reefs Hurting: Pollution, overuse killing off species*, DENV. POST, Aug. 27, 2002, at A2. Reefs are considered key indicators of ocean health. *Id.*

131. SPETH, *supra* note 1, at 56–57.

132. *Id.* at 57-58. If you are hoping to visit the world's coral reefs before they go extinct—think again! The literal footprints left by well-intentioned but novice ecotourists is one cause of reef deterioration. LISA MASTNY, TRAVELING LIGHT: NEW PATHS FOR INTERNATIONAL TOURISM 41 (Worldwatch Institute, 159 (2001)).

133. SPETH, *supra* note 1, at 57-58.

134. *Id.* at 5. As Speth explains, "For more than two decades even nongeniuses like myself have known not only the gravity of the climate challenge but also more or less what to do about it. And, of course, little has been done." *Id.*

135. See *supra* notes 42-49 and accompanying text for a discussion of environmental ethics.

136. Becker, *supra* note 101, at 68.

hope so. Realizing the interdependence between economies and ecologies may be the key to creating a healthy environmental future. This section considers a comprehensive solution that addresses money and conservation, and their relationship to each other.

Section A addresses global issues in terms of an ecological interplay. Section B looks specifically at the financial aspects of the worldwide health crisis. Section C uses Speth's transitions to consider progressive change. Finally, Section D concentrates on the compromise that sustainable development represents.

A. The Fragile "Ecosystem" of Environment, Economy and Society

The social and political consequences of environmental destruction cannot be underestimated. When considering massive catastrophes such as war, nuclear holocaust and terrorism, international law professor William Slomanson conceded the dire consequences of ignoring global health: "[W]e may come to recognize that environmental degradation could cause the breakdown of international society as we now know it."[137] A healthy planet has "important ramifications . . . for human security and social stability."[138]

Red Sky takes a comprehensive approach to environmental issues, addressing the entire problem-laden big picture. Due to the interdependence of organisms within an ecosystem, species preservation involves protection of entire habitats.[139] Similarly, issues of environmental health cannot be isolated entirely from the social, financial and political concerns that surround them.[140]

The natural environment is an essential—but not exclusive—part of what sustains life as we know it. As Speth and others point out, this in-

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137. SLOMANSON, *supra* note 53, at 585.

138. SPETH, *supra* note 1, at 7 (citing the COUNCIL ON ENVIRONMENTAL QUALITY & U.S. DEP'T OF STATE, THE GLOBAL 2000 REPORT TO THE PRESIDENT: ENTERING THE TWENTY-FIRST CENTURY 4 (1980) [hereinafter GLOBAL 2000 REPORT]. Though the report was initially commissioned in hopes of silencing environmental outcries without making changes, scientific evidence of global decline and the severity of its consequences were impossible to ignore. SPETH, *supra* note 1, at 3. The report found that environmental threats "are inextricably linked to some of the most perplexing and persistent problems in the world—poverty, injustice and social conflict . . . Vigorous, determined new initiatives are needed if worsening poverty and human suffering, environmental degradation, and international tensions and conflicts are to be prevented." *Id.* at 8 (quoting GLOBAL 2000 REPORT, at 4).

139. SPETH, *supra* note 1, at 25. "The principal cause of individual species loss by far is habitat destruction." *Id.*

140. *See supra* notes 15 and 35 for a discussion of the social and political impacts of environmental degradation. *See also* Dr. Rajendra Ramlogan, *The Environment and International Law: Rethinking the Traditional Approach*, 3 VT. J. ENV'T 4, ¶ 136 (2001-02), *available at* http://www.vjel.org/articles/articles/ramlogan.html (last visited Apr. 14, 2005). Labeling the multitude of international agreements as "treaty congestion," Dr. Ramlogan decides, "having separate monitoring and non-compliance processes, meetings of parties, financing mechanisms, scientific sources and advice, dispute resolution systems, and technical assistance schemes—can only lead to chaos." *Id.* at ¶¶ 113, 136.

terdependence requires inclusive and multi-faceted approaches to our problems.[141] Traditional, particularized approaches have failed to correct underlying causes of global environmental degradation.[142]

Interrelated environmental problems require a comprehensive solution. Speth explains that "[i]f the first attempt at global environmental governance was aimed primarily at symptoms, future efforts must attack the disease itself."[143] For example, Speth contends that the climate change convention[144] treated symptoms, while failing to cure the underlying disease: "The real problem may be poverty, weak and corrupt governments, or fossil fuels, or transportation, or chlorine-based organic chemistry, but the conventions were framed to address the surface worry rather than the deeper problems."[145]

Environmental issues rely on other life systems—economics, politics, culture—that surround them. Though some systems, such as environment and economy, appear to be antagonistic, their interconnectedness exemplifies a dependence among living systems. Diverse problems associated with global health are as parasitic, interdependent and mutually-sustaining as different organisms within an ecosystem.

B. Money is the "Root of All Evil,"[146] But What Would We do Without it?

There are financial aspects to almost every problem being addressed by environmental organizations today. It is naïve and simplistic to address environmental problems without confronting the economic incentives underlying ecological degradation.

However, money is also an essential part of environmental solutions. Speth quotes an old adage: "conservation without money is conversation."[147] Well-placed economic aid is fundamental to the solution of our planet's urgent environmental problems.[148]

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141. SPETH, *supra* note 1, at 151.

> Global environmental challenges are closely interlinked. They cut across economic sectors and geographical regions. They cannot be addressed issue by issue or by one nation or even by a small group of nations acting alone. They are driven by powerful forces and will not yield to the modest efforts we have been mounting.

Id.

142. SPETH, *supra* note 1, at 132.

143. *Id.* at 119.

144. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (1998).

145. SPETH, *supra* note 1, at 102.

146. *See id.* at 124. Speth looks to the world's major religions and cites their doctrines that warn against "the perils of wealth." *Id.*

147. *Id.* at 42.

148. *See id.* at 188-90. For example, money is used to buy conservation lands. *See id.* at 189-90. Hundreds of millions of dollars have launched the "hot spot" program, which will buy land reserves in regions of the world with the greatest biodiversity that have the greatest risk of habitat destruction. *See id.* The project will eventually cost billions. *See id.* at 189.

Money can help solve the problems, but pursuit of money is primarily what created them. Poverty drives environmental destruction.[149] Brazilian congressman Raul Jungman describes the situation in his country and others like it: "Poverty and misery and hunger. That's what destroys the environment."[150]

Money-making has an antagonistic dependency on the environment.[151] Exploitation of natural resources is extremely lucrative, but it is not without consequences.[152] Short-sighted economics can consume resources.[153] Conservation efforts can block development altogether.[154] Also, businesses tend to resist legislation that will cut into profits: Speth explains that "[e]conomic pressures can lead to political decisions that undermine even well-crafted treaties."[155]

However, developers and environmental activists must walk hand in hand if they are to ultimately preserve both of their interests. Speth warns, "If current trends continue, there will be large economic, social, and environmental costs to pay in the future."[156]

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149. *See* Rio Declaration on Environment & Development, June 14, 1992, 31 I.L.M. 874 (1992) [hereinafter RIO DECLARATION]. The Rio Declaration explicitly requires economic and humanitarian solutions to environmental problems: "All states and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world." *Id.* princ. 5, at 877. *See also* SPETH, *supra* note 1, at 42. Also, economic aid is a fundamental part of the attempt to alleviate international poverty. *See id.* Speth encourages, "development assistance and economic cooperation . . . debt relief or debt swaps or trade and investment arrangements." *Id.*

150. Kelly & London, *supra* note 88, at 76-77.

151. *See* SPETH, *supra* note 1, at 35-36. The findings of a recent World Resources Institute study of ecosystem health "starkly illustrate the trade-offs we have made between high commodity production and impaired ecosystems services, and indicate the dangers these trade-offs pose to the long-term productivity of ecosystems." *Id.* (quoting WORLD RES. INST. ET AL., WORLD RESOURCES 2000–2001, 51 (2000)).

152. *See id.* at 36. For example, "the World Bank estimates that the cost of air pollution in China's forests and crops exceeds five billion dollars annually." *Id.* at 53 (citing WORLD BANK, CLEAR WATER, BLUE SKIES: CHINA'S ENVIRONMENT IN THE NEW CENTURY (1997)).

153. *See id.* at 36. *See also* Garrett Hardin, *The Tragedy of the Commons*, 168 SCIENCE 1243, 1243 (1968). "The Tragedy of the Commons" is a phenomenon of human nature. *See id.* The typical example of a shared and limited resource is a sheepherder's common pasture. *Id.* The temptation to add just one more animal is irresistible for each herdsman. *Id.* However, this tiny lapse of unrestrained self-interest is ultimately fatal to the whole common pasture. *Id.* Hardin continues:

> Each man is locked into a system that compels him to increase his herd without limit in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

Id.

154. *See generally* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 153, 156-160 (1978) (stalling for years the construction completion of a multi-million dollar dam to discern the fate of a tiny regional fish species); Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 707 (9th Cir. 1993) (halting logging operations in Oregon to protect an endangered spotted owl).

155. SPETH, *supra* note 1, at 107. "Basically, our economic system does not work when it comes to protecting environmental resources, and second, the political system does not work when it comes to correcting the economic system." *Id.* at 133.

156. *Id.* at 36.

C. Speth's Eight Transitions Toward a Healthy Planet

After addressing the large picture of the interdependent systems that affect global health and narrowing his focus on the economics of environmental degradation, Speth presents his solutions.[157] He optimistically forecasts, "[T]hese transitions interact strongly, supporting each other and forming a whole that will one day define a qualitatively new epoch."[158]

1. Transition One: A Stable or Smaller World Population[159]

Speth refers to economist Partha Dasgupta who "argues that if women had a choice, they would opt for fewer children."[160] Population control typifies the intertwined workings needed for true reform. As birth control technology improves, women gain power, United Nations programs and financial aid continue, and families in developing nations gain access to control over their reproduction, population growth will slow.[161]

2. Transition Two: Free of Mass Poverty[162]

Speth points out the tragic irony that "poverty contributes to environmental decline . . . [and] [e]nvironmental decline also contributes to poverty."[163] But he optimistically sees "prospects for widely shared prosperity."[164]

Popular fiction writer Tom Robbins analogizes the absurdity of widespread poverty in a plentiful world: "It was akin to a starving woman with a sweet tooth lamenting that she couldn't bake a cake because she didn't have any ounces."[165] The world currently has enough resources to sustain its population. The problem is not availability—it is distribution.

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157. *See id.* at 151. Speth addresses necessary and urgent future action. *Id.*

> [T]his period can also become the watershed during which nations and peoples everywhere come together finally to deal with the problems massing on the environmental front. If we can make that happen, our legacy from these early decades of the new century will be a world sustained, not a world of wounds.

Id.

158. *Id.* at 152.

159. *Id.*

160. *Id.* at 121.

161. *See id.* at 153.

162. *Id.* at 154.

163. *Id.*

164. *Id.*

165. TOM ROBBINS, SKINNY LEGS AND ALL 463 (1990). The quote is prefaced by a discussion of the problems of poverty: "During periods of so-called economic depression, for example, societies suffered for want of all manner of essential goods, yet investigation almost invariably disclosed that there were plenty of goods available . . . What was missing was not materials but an abstract unit of measurement called 'money.'" *Id.* The passage concludes, "The loony legacy of money was that the arithmetic by which things were measured had become more valuable than the things themselves." *Id.* at 464.

Speth agrees that poverty is largely a problem of wealth distribution: "Eliminating large-scale poverty is not a crazy dream . . . [however,] a serious threat to achieving these goals is near-miserly development assistance."[166] Debt relief, trade regulation reform, economic aid, and shared technology can balance the inequity between developing and developed nations.[167]

3. Transition Three: Environmentally Benign Technologies[168]

Speth's third transition calls for "a worldwide environmental revolution in technology."[169] Advancing the technology that drives modern lifestyles is a pragmatic way to minimize its harmful side effects without halting consumption. Speth declares, "the principal way to reduce pollution and resource consumption while achieving expected economic growth is to bring about a wholesale transformation in the technologies that today dominate manufacturing, energy, transportation, and agriculture."[170]

4. Transition Four: Environmentally Honest Prices[171]

Speth's fourth transition rests on innovative economics. His neoclassical economic model seeks "transition to a world in which market forces are harnessed to environmental ends, particularly by making prices reflect the full environmental costs."[172]

He also discusses "natural capitalism," which shifts fundamental paradigms to greater appreciation of natural services. This environmentally friendly economic theory acknowledges human and natural capital and calls for increased efficiency and improved quality of products and services.

Natural capitalism also aspires to reform governments to be "based on the needs of people rather than business."[173] This new economic theory reveres "the economy's dependence on the environment."[174]

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166. SPETH, *supra* note 1, at 154.
167. *See id.* at 154-55.
168. *Id.* at 157.
169. *Id.*
170. *Id.*
171. *Id.* at 161.
172. *Id.* Speth lists some environmental economists' tools for reform: "securing property rights to overcome the 'tragedy of the commons' problem, tradable emission permits, pollution taxes, user fees, shifting subsidies from environmentally damaging activities to beneficial ones, and making polluters and others financially liable for damages they cause." *Id.* at 162.
173. *Id.* at 165-66 (quoting PAUL HAWKEN ET AL., NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION 6 (1999)).
174. *Id.* at 166.

5. Transition Five: Sustainable Consumption[175]

Environmental challenges "require rethinking the utopian materialism that puts a premium only on unlimited economic expansion."[176] Current practices of unbridled consumption have disastrous environmental impacts.[177]

Speth offers high praise for the Environmental Grantmakers Association's five-part plan for promoting sustainable consumption, calling it "an excellent agenda."[178] The plan seeks to: 1) "[i]ncrease consumer awareness and choice"; 2) "[p]romote innovative policies"; 3) "[a]ccelerate demand for green products"; 4) "[d]emand corporate accountability"; and 5) "[e]ncourage sustainable business practices."[179]

6. Transition Six: Knowledge and Learning[180]

Speth attributes part of the current environmental crisis to an uninformed public: "If we had invested generously in environmental education at all levels over the past three decades, we would not be in as dangerous a situation as we find ourselves today."[181] The issues surrounding global health are so obvious and urgent that in many cases, they speak for themselves.

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175. *Id.*

176. *Id.* at 113. Speth also refers to the "growth-at-all-costs imperative." *Id.* at 138. In the U.S., the phenomenon can individually be termed as an American sense of entitlement, facilitating 24-hour consumerism. *Id.* This rampant consumer need goes beyond the limits of sensibility and budget, facilitating epidemics in obesity and consumer debt. *Id.* As Speth explains: "Can a country make a decision that enough is enough? Or is our current system so geared to high economic growth that it is either up, up and away or down, down and out?" *Id.* at 192.

177. *Id.* at 83. The American aspects of problematic over-consumption and over-production have been characterized by Yale professor Charles Reich:

> In the second half of the twentieth century [the] combination of an anachronistic consciousness characterized by myth, and an inhuman consciousness dominated by the machine-rationality of the Corporate State, have, between them, proved utterly unable to manage, guide, or control the immense apparatus of technology and organization that America has built. In consequence, this apparatus of power has become a mindless juggernaut, destroying the environment, obliterating human values, and assuming domination over the lives and minds of its subjects.

CHARLES REICH, THE GREENING OF AMERICA 18 (Random House 1970). Speth defines the international forces behind environmental deterioration and concludes, "[T]hese forces—notably the steady expansion of human populations, the routine deployment of inappropriate technologies, the near universal aspiration for affluence and high levels of consumption, and the widespread unwillingness to correct the failures of the unaided market—are indeed powerful and will not yield to half-measures." SPETH, *supra* note 1, at 99.

178. *Id.* at 168-69.

179. *Id.* (quoting JOEL MAKOWER & DEBORAH FLEISCHER, ENVTL. GRANTMAKERS ASS'N, SUSTAINABLE CONSUMPTION AND PRODUCTION: STRATEGIES FOR ACCELERATING POSITIVE CHANGE 2-3 (2003)).

180. *Id.* at 169.

181. *Id.* at 170. Speth calls for increased scientific research, reporting and education; he also indicts the media for failing to inform the public of environmental problems. *See id.*

Unfortunately, there does not seem to be a wide audience listening. Speth calls for educational reforms: "a well-ordered democracy demands much larger investments in scientific and environmental literacy."[182]

7. Transition Seven: Taking Good Governance Seriously[183]

8. Transition Eight: Culture & Consciousness[184]

These final transitions are large enough to each constitute a whole chapter in *Red Sky*.[185] They are addressed and expanded upon in Part IV of this paper.[186]

D. Toward Compromise and New Conventions: Sustainable Development

As the United Nations Environmental Program realized:

> Human activities are progressively reducing Earth's life-supporting capacity at a time when rising populations and consumption are making increasingly heavy demands on the planet. The combined destructive impacts of a poor majority struggling to stay alive and an affluent minority consuming most of the world's resources are undermining the very means by which all people can survive and flourish.[187]

After decades of frustrated antagonism, pragmatists have tried to reconcile economic advancement and environmental protection. A powerful think tank of world leaders determined, "unless major complementary initiatives are undertaken to bring environmental, economic, and social objectives together in the new synthesis called *sustainable development*, liberalizing trade and reviving growth could lead to short-term gains and long-term disaster."[188]

Sustainable development "seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future."[189] For example, regional fishing industries, which often support

182. *Id.* at 171.
183. *Id.* at 172.
184. *Id.* at 191.
185. *See id.* at 172–201.
186. *See infra* Part IV and accompanying text.
187. SPETH, *supra* note 1, at 132 (quoting INT'L UNION FOR THE CONSERVATION OF NATURE AND NATURAL RES. ET AL., WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT 1 (1980)).
188. *Id.* at 146 (quoting the "Open Letter to the Heads of State and Government of the Americas," written by a group of political leaders including Fernando Henrique Cardoso (later president of Brazil) and Al Gore, Jr. (later vice-president of the U.S.), *in* THE NEW WORLD DIALOGUE ON ENV'T AND DEV. IN THE W. HEMISPHERE, COMPACT FOR A NEW WORLD 1 (1991)).
189. *Id.* at 141 (quoting WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 40 (1987)).

totally dependent communities, cannot over harvest to the point of extinction without completely ceasing to exist.[190]

As Speth explains, sustainable development rests on "the 'triple bottom line' of economy, environment, and society."[191] It seeks to satisfy current developing needs without compromising long-term renewable resources.[192] As opposed to immediate economic gratification that consumes a resource entirely and spits out pollution, sustainable development and replentishable harvest levels ensure that more money, ultimately, can be made over a long period of time.[193] This new concept protects and furthers both economic and environmental interests.

IV. INNOVATIVE JAZZ, FUSION AND OTHER RADICAL IDEAS TO SAVE OUR SICK PLANET

> *It seems increasingly probable that Western culture is in the middle of a fundamental transformation . . . [rethinking] how to understand and (re)constitute the self, gender, knowledge, social relations, and culture without resorting to linear, teleological, hierarchical, holistic, or binary ways of thinking and being . . . [new ideologies] should encourage us to tolerate and interpret ambivalence, ambiguity, and multiplicity as well as to expose the roots of our needs for imposing order and structure no matter how arbitrary and oppressive these needs may be.*[194]

If Speth's first six transitions are steps toward sustainability, Speth's final two transitions, in governance and attitude, empower the first six.[195] Speth's seventh transition involves government, private business and communities working both separately and together for new and effective governance.[196] Because the systems currently in place are fail-

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190. *See* Thomas Hayden, *Emptying Out the Oceans*, U.S. NEWS & WORLD REP., July 6, 2004, at 40, 42-43. "In a series of recent reports, scientists warn that fish stocks are dangerously overexploited and that many of the methods that provide the fish, crustaceans, and mollusks we so enjoy are destroying the very ocean habitats and ecosystems needed to rebuild the stocks." *Id.* at 40.

191. SPETH, *supra* note 1, at 180.

192. *See id.* at 180-81.

193. *See id.* While clear-cutting exemplifies the short-sighted and environmentally destructive practices that have created the global environmental health crisis, well-managed forestry is a good example of sustainable development. *See generally* David Whitman, *From Stumps, Lush Forests*, U.S. NEWS & WORLD REPORT, July 6, 2004, at 77, 77–78. In non-tropical, industrialized countries, almost ninety percent of forests are managed. *Id.* at 78. Good management has produced successful reforesting: "From 1990 to 2000, while tropical forests shrank by 12 percent, *non*-tropical forests increased by 3 percent." *Id.* at 77.

194. Jane Flax, *Postmodernism and Gender Relations in Feminist Theory*, *in* FEMINISM/POSTMODERNISM 39, 56 (Linda J. Nicholson ed., 1990).

195. SPETH, *supra* note 1, at 171.

> These six of eight transitions are vital to the success of the effort to chart a new course in global environmental protection. But they will not get far without strong and effective government action motivated by an aroused and active citizenry. The needed transitions in governance and in public attitudes and motivation are taken up in the . . . [final] chapters.

Id.

196. *Id.* at 172-90.

ing, it is time for reorganization and innovation.[197] Section A addresses several ways we can take good governance seriously.[198]

Speth's final, and eighth, transition is a progressive change in personal consciousness and community culture that appreciates and protects the natural world.[199] Primarily, we need a new understanding of worldwide mechanisms such as society and economy.[200] Section B discusses a new paradigm that understands these mechanisms not as independent and irreconcilable forces, but in terms of an interworking, interdependent, and evolving system.[201]

Section C looks outside Speth's work to other fields of scholarly inquiry.[202] First, Subsection One considers undoing the concept of dualism. Postmodern philosophy presents an ironic, inclusive, dialectic paradigm that escapes binary thinking and the artificial constructs of dual polarities.[203] Next, Subsection Two considers how a departure from the colonial Western paradigm of command and control power politics, to a scheme driven by ethics and honor, may be a more effective means of enacting and enforcing change.[204]

In Subsection Three, an examination of the rhetoric of rights shows that many proclamations are merely aspirational ghost rights, as opposed to living, empowered rights.[205] And finally, Subsection Four looks at the many schools of feminist thought to help define and create a feminized consciousness that encourages harmonious human interaction with the planet.[206]

Emerging throughout Part IV and throughout *Red Sky* is a theme of inclusiveness.[207] This inclusiveness avoids unnecessary choice by synthesizing disparate concepts, accepting pluralism and paradox. Also, perhaps ironically, reflecting the American consumerist attitude of needing everything and more—an insatiable, consuming juggernaut, but in

197. *See id.* at 149 ("Despite the repeated alarms rung over the past quarter century, the earth's ills have deepened and widened. Our initial effort at global environmental governance has fallen short, and we must turn with urgency to new approaches and to a new generation of environmental leaders.").

198. *Id.* at 172-90. This is Speth's seventh fundamental transition and the title of Chapter Nine.

199. *See id.* at 149 ("And, at the heart that drives the flow of these many [new governance] actions, there must be a deeper change, a different way of seeing ourselves in relation to the planet on which we live.").

200. *Id.*

201. *Id.* at 151. "Global environmental challenges are closely interlinked. They cut across economic sectors and geographical regions." *Id.* A revised inclusive paradigm echoes the admonitions of "Social Ecology." *See infra* notes 263, 313, 374 and accompanying text.

202. *See infra* notes 254–328 and accompanying text.

203. *See infra* notes 260–69 and accompanying text.

204. *See infra* notes 270–85 and accompanying text.

205. *See infra* notes 286–304 and accompanying text.

206. *See infra* notes 305–28 and accompanying text.

207. SPETH, *supra* note 1, at 201.

the realm of ideas.[208] Speth inclusively decides that three factors have "stymied real progress on the global environmental front."[209]

But although Speth can list problems, he also lists solutions.[210] His eight transitions work inclusively: "these transitions interact strongly, supporting each other and forming a whole . . . ."[211] Accepting *Red Sky's* underlying theme of inclusiveness epitomizes and facilitates the paradigm transformations that Speth calls for.[212] Why choose to limit ourselves when we can have it all?[213]

A. Taking Good Governance Seriously

Speth's seventh transition is multi-faceted.[214] New models of action and government come from The World Business Council for Sustainable Development (WBCSD), an international group comprised of major corporations, the goals of which are primarily economic.[215] The group's first system is the old, ineffective one: "FROG," which stands for "First Raise Our Growth."[216] FROG places primacy on immediate economic gain, at the expense of the environment.[217]

WBSCD's second concept is GEOpolity, which is the traditional world of law and government.[218] But their third and fourth systems, JAZZ and FUSION, are part of the revolutions in paradigms and culture that respond to the urgent need for true innovation.[219] JAZZ is about pri-

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208. SPETH, *supra* note 1, at 183.

209. SPETH, *supra* note 1, at 200.

> Is the main barrier simply the United States, which has dragged its feet on issue after issue since initially giving leadership in protecting Earth's ozone shield? Or are we confronting a typical situation in politics where noneconomic goals need higher priority, more urgency, and some new policies and approaches? Or is the problem deeply structural, rooted fundamentally in our economic system and our international system of sovereign states? My conclusion . . . is that it is all three.

Id.

210. *Id.* at 152.

211. *Id.*

212. *Id.*

213. By "having it all" I mean to say that we can save the planet and continue to live comfortably. As Speth explains, "[t]he initiatives that are recommended to advance the eight transitions do not fundamentally threaten the prevailing economic and international systems." *Id.* at 201.

214. *Id.* at 172-90. Chapter Nine addresses *governance*, which is governing through government and more. *Id.* (emphasis added). "'Global governance' does not imply global government; nor does it include only the actions of governments. Many non-government communities, for-profit and not-for-profit, are already playing large roles in the governance of the global environment as we know it today." *Id.* at 77.

215. *Id.* at 172.

216. *Id.*

217. *Id.* (citing WORLD BUSINESS COUNCIL FOR SUSTAINABLE DEVELOPMENT, EXPLORING SUSTAINABLE DEVELOPMENT: GLOBAL SCENARIOS, 2000-2050: SUMMARY (1997)).

218. *Id.* at 172-73.

219. *Id.* at 173, 188-89.

vate businesses and citizens enacting their own change,[220] while FUSION is the harmonious inclusion of both GEOpolity and JAZZ.[221]

1. FROG: First Raise Our Growth[222]

The attitude that growth and money-making need to be immediate and should come at all costs quickly is becoming outmoded.[223] As Speth describes it, "FROG is thus a business-as-usual scenario leading to huge environmental costs."[224] A system that places economics above all else may have short-term financial pay-offs, but the long-term consequences are disastrous.[225]

Even economically, resource depletion, overharvesting to extinction, and desertification of productive lands are bad for business.[226] Thus Speth concludes, "FROG leads not just to a wrecked global ecosystem but to a wrecked global society as well. It is a path to failure even in the eyes of the business-oriented WBCSD."[227]

2. GEOpolity:[228] The Traditional World of International Law

One of the common arguments used to dispute the "Tragedy of the Commons" scenario[229] is that modern governments do not let self-interest go completely unchecked and that regulation can solve environmental problems.[230] Speth acknowledges the important role of govern-

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220. *Id.* at 173, 184-89.
221. *Id.* at 188-90.
222. *Id.* at 172.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.* at 31-32.
227. *Id.* at 172. *See also* WORLD BUSINESS COUNCIL, *supra* note 217, at 19-21.
228. SPETH, *supra* note 1, at 172-73.
229. *See supra* note 153 for a discussion of the "Tragedy of the Commons."
230. GURUSWAMY, *supra* note 12, at 244-46 (reprinting Julian Simon, *There Is No Environmental, Population or Resource Crisis, in* LIVING IN THE ENVIRONMENT: AN INTRODUCTION TO ENVIRONMENTAL SCIENCE 29 (1992)). Julian Simon is considered a scholarly opponent of environmentalism. However, even his "there is no environmental crisis" analysis relies on strong and enforceable international laws. "But the world's physical conditions and the resilience in a well-functioning economic and social system enable us to overcome such problems . . . ." *Id.* at 246. Unfortunately, regulations are not doing enough and there are still many government subsidies that encourage pollution and waste, so his argument suffers for its faith in systems that pragmatically fall far short of simply "overcoming" environmental problems. Simon's ideas also seem to rely on the fact that environmentalists (who do not agree with him) will take charge and solve everyone else's problems.

> [W]e do not say that a better future happens automatically or without effect. It will happen because men and women—sometimes as individuals, sometimes as enterprises working for profit, sometimes as voluntary nonprofit-making groups, and sometimes as governmental agencies—will address problems with muscle and mind, and will probably overcome . . . .

Id. Even critics like Simon, who appear to disagree with Speth, agree with his assertions that strong government, environmental regulation and citizen action are essential to global sustenance. *Id.* Speth debunks Julian Simon and Danish skeptic Bjorn Lomborg and their anti-environmental ideologies. SPETH, *supra* note 1, at 113-15.

ment with his Seventh Transition, but he also says that today's system needs improvement.[231]

Speth explains, "[U]nder 'GEOpolity,' people turn to governments to focus the market on environmental and social ends, and they rely heavily on intergovernmental institutions and treaties."[232] Although international law has had its successes, reliance on GEOpolity alone is not enough.[233]

Speth decides that finding real solutions to the global environmental crisis "requires new action on two mutually supportive fronts: pursuing a very different approach to GEOpolity, and taking JAZZ [explained below] to scale, enlarging it until it is a major part of the solution."[234]

3. JAZZ: People and Businesses Acting for the Earth, by Themselves[235]

The WBCSD calls its third scenario JAZZ. As Speth describes: "people and businesses create a world full of unscripted, voluntary initiatives that are decentralized and improvisational, like jazz . . . . Governments facilitate more than regulate . . . ."[236]

Consumers exercise great power with their spending. JAZZ-type innovations represent what Benjamin Cashore has called, "a startling new phenomenon . . . the emergence of domestic and transnational private governance systems that derive their policymaking authority not from the state, but from the manipulation of global markets and attention to customer preferences."[237]

Speth argues that "green JAZZ is the most exciting arena of ongoing action today. Environmental groups, consumer groups, and other

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231. SPETH, *supra* note 1, at 173. It has been over thirty years since the international community proclaimed, "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments." STOCKHOLM DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, 11 I.L.M. 1416, Part I (1972). It has also been twelve years since the world community declared: "States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem." RIO DECLARATION, *supra* note 149, at princ. 7. Yet despite these and other treaties, as well as other international and domestic laws, the health of the global environment has continued to deteriorate to the urgent crisis stage we are currently facing. *Id.* Speth determines that we need a "transition in governance to capable, accountable, and democratic governments." SPETH, *supra* note 1, at 173. He also says, "there must be new procedures, institutions and understandings if GEOpolity is to do the job." *Id.* at 175.

232. SPETH, *supra* note 1, at 172.

233. *Id.* at 173.

234. *Id. See infra* Part V for a discussion on possible new approaches to international government.

235. *Id.* at 184-88.

236. *Id.* at 173.

237. *Id.* at 184-85 (quoting Benjamin Cashore, *Legitimacy and the Privatization of Environmental Governance: How Non State Market-Driven (NSMD) Governance Systems Gain Rule Making Authority*, 4 GOVERNANCE 15, 503–04 (2002)).

NGOs [non-government organizations], private businesses, state and local governments, foundations, religious organizations, investors, and others are behind a remarkable outpouring of initiatives that are the most hopeful things happening today."[238]

While governments and international laws are tools for change, Speth concludes that "[g]lobal problems have gone from bad to worse, governments are not yet prepared to deal with them, and, at present, many governments, including some of the most important, lack the leadership to get prepared."[239] So action by others, through improvisational, self-reliant JAZZ, is an important part of an inclusive plan for global sustenance.

4. FUSION: Incorporating the Best of Both Worlds[240]

Just as the world's mechanisms of economy, politics, ecology and society are part of an integrated, interdependent system, GEOpolity and JAZZ share the same goals and, thus, can work together. Speth explains:

> "One reason we are hearing so much JAZZ, especially from the business community, is because of all the classical music being played over in GEOpolity Hall. And what is it when jazz and classical music are brought together? It's called FUSION, of course, and we are beginning to see it as well."[241]

So just as the global community must come together to solve our planet's urgent health crisis, we must also bring together as many methods and mechanisms as possible.[242] JAZZ and FUSION, and the harmonious cooperation they represent, are part of the innovations in thought and action that can affect real—and urgently needed—change.

B. The Most Fundamental Transition of All[243]

Resolving many environmental problems will require shifting cultural paradigms. Speth describes his eighth transition as quintessential: "[t]he most fundamental transition is the transition in culture and consciousness."[244] Speth refers to the "new consciousness" of scholars such as the Global Scenario Group. "They favor a 'new sustainability' scenario where society turns 'to nonmaterial dimensions of fulfillment . . . the quality of life, the quality of human solidarity and the quality of the

238. *Id.* at 184.
239. *Id.* at 97.
240. *See id.* at 188.
241. *Id.* at 188. *See supra* notes 207-13 and accompanying text for a discussion of inclusion.
242. *See infra* note 260-69 for a discussion on abandoning dualities for more inclusive and cooperational paradigms.
243. SPETH, *supra* note 1, at 191. This is the title of Chapter Ten, and the eighth, and final, transition that Speth hopes will eventually form "a whole that will one day define a qualitatively new epoch." *Id.* at 152.
244. SPETH, *supra* note 1, at 191.

earth . . . . Sustainability is the imperative that pushes the new agenda."[245]

As the Leopoldian land ethic evolves,[246] concepts of humanity as conquerors of nature may some day seem barbaric.[247] But concepts of stewardship also may fail, because they reflect a subtle arrogance and implied possession and dominance over the natural world.[248]

The new paradigm may be one of an indentured servant—utterly reliant, indebted, and working hard to satisfy a demanding master. As Speth points out, we owe the planet, and our debt is large.[249] Centuries of unchecked development have devoured natural resources and left us with a sick ecosystem. Speth acknowledges that "[t]he global environment is . . . powerfully affected by human activities and requires management."[250]

The image of an indentured servant is a bleak one. A kinder image is one of humanity in the age-old metaphor of an infant relying on its mother, earth. However, this kinder image of nurturing and sustenance may be too kind, because humanity will never be weaned. It is precisely because we forgot our infantile dependence on Mother Earth that we find ourselves in this dire predicament today.[251] As Speth explains, "[t]he fact is, we are utterly dependent on ecosystems to sustain us."[252]

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245. *Id.* at 193 (quoting PAUL RASKIN ET AL., GREAT TRANSITION: THE PROMISE AND LURE OF THE TIMES AHEAD, 44-45 (Stockholm Institute/Tellus Institute 2002)).

246. *See* Timothy N. Jenkins, *Economics and the Environment: A Case of Ethical Neglect*, 26 ECOLOGICAL ECON. 151, 153, 159–62 (1998).

> [T]here is a clear postmodern re-emergence of a Leopoldian 'land ethic' in the West, which is slowly . . . changing public policy and popular culture. Such an ethic is premised on the idea that an individual is a member of an interdependent community, with all that this implies with regard to social and antisocial conduct, and that the community's boundaries are extendable to include 'land' in its broadest sense (i.e. the natural world).

Id.

247. SPETH, *supra* note 1, at 24. "Leopold's 'land ethic' . . . changes the role of homo sapiens from conqueror of the land-community to plain member and citizen of it." *Id.* (quoting RODERICK FRASIER NASH, THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS 63-77 (1989)).

248. *See id.* at 110. "At the root of America's negative role is what can only be described as a persistent American exceptionalism, at times tinged with arrogance." *Id.* Speth also notes President Bush's reluctance to cooperate with United Nations programs, refusal to sign or ratify treaties, and recent refusal to even attend conferences on the environment. "[T]he lion's share of the blame must go to the wealthy, industrial countries and especially to the United States, which, since the Montreal Protocol, has not accorded global-scale environmental challenges the priority needed to elicit determined, effective responses." *Id.* at 116.

249. *See id.* at 21. "We now live in a full world. An unprecedented responsibility for planetary management is now thrust upon us, whether we like it or not. This huge new burden, for which there is no precedent and little preparation, is the price of our economic success." *Id.*

250. *Id.* at 78. "The global environment is more of an integrated system than the global economy. It is even more fundamental to human well-being." *Id.* Speth calls for a "Declaration of Dependence—the economy's dependence on the environment." *Id.* at 166.

251. *Id.* at 138 ("This view of the world—that nature belongs to us rather than we to nature—is powerful and pervasive, and it has led to much mischief.").

252. SPETH, *supra* note 1, at 26.

> From the water we drink to the food we eat, from the sea that gives up its wealth of products, to the land on which we build our homes, ecosystems yield goods and services that

However we choose to envision it, the changes needed to create a healthy global ecosystem cannot come without transition to a new respect for humanity's reliance on a fragile planet. Earth Charter eloquently expresses the changes needed:

> The resilience of the community of life and the well-being of humanity depend upon preserving a healthy biosphere with all its ecological systems, a rich variety of plants and animals, fertile soils, pure waters, and clean air. The global environment with its finite resources is a common concern of all peoples. The protection of Earth's vitality, diversity, and beauty is a sacred trust.[253]

C. Incorporating Creative Ideas from other Realms of Scholarship

Speth warns, "it is business as usual that is utopian, whereas creating a new consciousness is a pragmatic necessity."[254] Invoking Einstein's adage that you cannot solve problems with the mindset that created them, Speth has called for a fundamental revolution in culture and paradigm. The following four subsections examine failed concepts such as duality,[255] Eurocentric superiority,[256] reliance on ghost rights,[257] and male domination.[258] Casting off these detrimental constructs are essential steps toward creating a new consciousness of inclusiveness, diversity, powerful living rights and gender equality.[259]

1. Undermining Traditional Duality

One of the products of Enlightenment thinking is organization of the world into binary polarities: good/evil, male/female, man-made[260]/natural, and rational/emotional.[261] However, the organic world does not fit so comfortably within these extreme artificial constructs. As postmodernists bring new philosophies of being, objectification and un-

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> we can't do without. Ecosystems make the Earth habitable: purifying air and water, maintaining biodiversity, decomposing and recycling nutrients, and providing myriad other critical functions.

Id.

253. THE EARTH CHARTER, *supra* note 33.

254. *Id.* at 196.

255. *See infra* notes 260-69 and accompanying text.

256. *See infra* notes 270-85 and accompanying text.

257. *See infra* notes 286-304 and accompanying text.

258. *See infra* notes 305-28 and accompanying text.

259. *See infra* notes 260-328 and accompanying text.

260. Decisions on gendered language have a unique position in historical discussions. In many instances, decisions made by the political power structures of "humanity" are reflections of a dominantly male, patriarchal mindset. Therefore, conversion to gender-neutral language is not always ideologically appropriate. "[T]erminology . . . is sexist . . . the inevitable result of the long exclusion of women from the realm of international politics and law [and] a tangible symbol of one of the silences of international law." GURUSWAMY, *supra* note 12, at 14. Because women were largely silent as the paradigm emerged, it is fair to say "man-made," not humanity-made, versus natural.

261. *See* Peter H. Huang, *International Environmental Law and Emotional Rational Choice*, 31 J. LEGAL STUD 237, 244 (2002) ("Rene Descartes envisioned such a rigid separation or dualism between body and mind.").

decidables[262] to the intellectual table, environmentalists can use these tools to deconstruct the culture of global environmental degradation and its reliance on dualistic thinking.[263]

One of the grave dangers of binary thinking is the traditional mindset that pits man against nature.[264] We should not wage war against the planet, which can continue its life without us, just as it did when dinosaurs went extinct. We need Mother Earth more than she needs us.[265]

Undermining dualistic, binary logic will help in the work toward pragmatic solutions to our global health crisis. Viewing humanity as part of nature, not diametrically opposed to nature, is an essential cultural transition.[266] Also, abandoning absolute polar opposites facilitates compromise, inclusion,[267] and cooperation.[268] Sustainable development rests on the idea that the economy and the environment need not face off in

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262. JACK REYNOLDS, UNDERSTANDING DERRIDA 46 (Jack Reynolds & Jonathan Roffe eds., 2004) ("An undecidable . . . is something that cannot conform to either polarity of a dichotomy . . . .").

263. John Clark, *What is Social Ecology?*, *in* RENEWING THE EARTH: THE PROMISE OF SOCIAL ECOLOGY 5, 5-11 (John Clark ed., 1990), *reprinted in* GURUSWAMY, *supra* note 12, at 306. Clark describes Social Ecology's rejection of binary categorization:

> A dualism that sets spirit against matter, soul against body, humanity against nature, subjectivity against objectivity, and reason against feelings. A dualism that is intimately related to the social divisions that are so central to the history of civilization: ruler versus ruled, rich versus poor, . . . male versus female, in short, the dominant versus the dominated.

Id.

264. *See supra* note 260.

265. *See supra* notes 250-52 and accompanying text for a discussion of humanity's infantile dependence on Mother Earth. "We incline to other pernicious habits of thought . . . seeing the natural world as a resource for the economy rather than seeing the economy as nested in the natural world." SPETH, *supra* note 1, at 139.

266. THE EARTH CHARTER, *supra* note 33, at the Preamble:

> We are at once citizens of different nations and of one world in which the local and global are linked . . . The spirit of human solidarity and kinship with all life is strengthened when we live with reverence for the mystery of being, gratitude for the gift of life, and humility regarding the human place in nature.

Id.

267. *See supra* notes 207-12 and accompanying text for discussion of inclusion.

268. Christopher C. Joyner & George E. Little, *It's Not Nice to Fool Mother Nature! The Mystique of Feminist Approaches to International Environmental Law*, 14 B.U. INT'L L.J. 223, 240 (1996).

> Dialectical reasoning examines processes that bring together ideas which appear to be antithetical to one another. Construction of a dialectic occasions the 'organic emergence' of links between certain ideas that at first blush appear contradictory . . . [T]wo 'diametrically opposed' images in the dialectic thus are vigorously made to reflect off one another, casting similar and different shadows. Both the similarities and differences between the two images are important to recognize. Dialectic synthesis does not permit clear labeling of the dichotomies as mutually exclusive or self-evidently incompatible.

Id. Donna Haraway goes beyond a dialectic model to a model for "an ironic political myth faithful to feminism, socialism and materialism," which has analogous lessons for creating practical environmental solutions. Donna Haraway, *A Manifesto for Cyborgs: Science, Technology, and Socialist Feminism in the 1980s*, *in* FEMINISM/POSTMODERNISM 190 (Linda J. Nicholson ed., 1990). "Irony is about contradictions that do not resolve into larger wholes, even dialectically, about the tension of holding incompatible things together because both or all are necessary and true." *Id.*

opposition: we do not have to choose between healthy economies and healthy ecosystems because we can have both.[269]

2. Rethinking the Dominant and Domineering Western Paradigm

In many ways, the current environmental crisis is a byproduct of colonial rule and the mindset that European, male, and Christian ideologies were superior.[270] This self-serving paradigm entitled colonizers to dominate and exploit the rest of the world.[271] Many developing nations resist international law today as a product and, thus, reflection, of this skewed paradigm.[272] Some also perceive environmentalism as a luxury or even conspiracy that richer nations have proliferated to inhibit developing nations' growth.[273] Speth addresses the problem in terms of Northern and Southern hemispheric distinctions.[274]

Western oppression links concerns over an exploited environment to concerns of oppressed peoples. For example, one of international law's primary feminist works discusses the analogous worldviews of African cultures and women.[275] Also, an international task force found that environmental ethics mirror the paradigms of many indigenous peoples.[276] These parallels illustrate how eroding the dominant colonial mindset will liberate exploited peoples and exploited ecosystems. The civil rights movements of the past two hundred years have been efforts to

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269. *See supra* notes 187-93 and accompanying text for a discussion of sustainable development.

270. *See generally*, NOAM CHOMSKY, YEAR 501: THE CONQUEST CONTINUES (South End Press 1993) Chomsky discusses European colonists' oppressive exploitation of the Americas:

> The major theme of this Old World Order was confrontation between the conquerors and the conquered on a global scale. It has taken various forms, and been given different names: imperialism, neocolonialism, the North-South conflict, core versus periphery, G-7 (the 7 leading state capitalist industrial societies) and their satellites versus the rest. Or, more simply, Europe's conquest of the world.

Id. at 3.

271. *Id.*

272. MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER 49-50 (1979). "International law made use of a series of justifications and excuses to create legitimacy for the subjugation and pillaging of the Third World, which was pronounced uncivilized." *Id.*

273. SPETH, *supra* note 1, at 107-08.

274. *Id.* at 107-08, 174-75.

275. Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 617-22 (1991).

276. *See* GURUSWAMY, *supra* note 12, at 313-14 (citing IUCN INTER-COMMISSION TASK FORCE ON INDIGENOUS PEOPLES, INDIGENOUS PEOPLES AND SUSTAINABILITY: CASES AND ACTIONS 36-38 (1997)). In contrast to the Western paradigm of man conquering nature, "Indigenous Peoples frequently view themselves as guardians and stewards of nature. Harmony and equilibrium among components of the Cosmos are central concepts in most indigenous cosmologies." *Id.* at 314. While refusing to over-generalize because, "[t]his ethic cannot be regarded as universal," the task force did offer prevalent themes among indigenous cultures. *Id.* They include cooperation, strong family ties (including past and future generations), self-sufficiency through reliance on local natural resources, and "restraint in resource exploitation and respect for nature, especially for sacred sites." *Id.*

cast off colonial legacies, impacting the rights of ethnic and racial minorities, indigenous peoples, women and the environment.[277]

A new worldview will benefit all who are exploited by Western models of oppression. Speth envisions a "new consciousness . . . [that] breaks with anthropocentrism and contempocentrism . . . ."[278] Replacing the oppressive and exploitative paradigm that created the global health crisis will benefit all who are dominated.

This new culture may borrow from the world's other cultures, as well as from psychology and socio-economic theory.[279] One suggestion is for "a different model of compliance with international environmental law, soft or hard, that is based on the motivation of not wanting to lose face in the international community."[280] Making environmental policies honorable and relying on self-monitored compliance may be a more realizable task than trying to force external sanctions upon the unwilling.

Western "command and control" politics rely on third-party enforcement and external exertions of power.[281] However, as Huang indicates, in world with weak laws and a high level of deference to national sovereignty, "compliance . . . cannot ultimately rest solely on enforcement by external sanctions."[282] Even if traditional "command and control" policies were feasible, which Speth points out is thus far a practical impossibility,[283] they may not be entirely desirable as the exclusive tools of international environmental governance.[284] In the end, it may be far more effective to appeal to a new morality and self-governance than to

277. SPETH, *supra* note 1, at 193-96. Speth notes that, "the potential for conscious evolution is evident in great social movements that societies have already experienced, such as the abolition of slavery, the civil rights movements, and the collapse of communism and the Soviet empire." *Id.* at 196. Speth continues with an admonition: "our global civilization had better move rapidly to modify its cultural evolution and deal with its deteriorating environmental circumstances before it runs out of time." *Id.* at 193 (quoting PAUL R. EHRLICH, HUMAN NATURES: GENES, CULTURES, AND THE HUMAN PROSPECT 330 (2000)).

278. SPETH, *supra* note 1, at 192. Anthropocentrism is a human-centered paradigm that places people above all else to the detriment of the natural world. *Id.* at 138. Speth defines contempocentrism as "the habit of thought that discounts the future in favor of the present." *Id.*

279. Huang, *supra* note 261, at 241. "Microeconomic theorists originally formulated and developed rational choice models to mathematically analyze the pure theory of individual consumer behavior." *Id.* Huang follows the scholarship that applies rational choice theories to political science and international relations. *Id.* at 241-42. Huang goes on to incorporate theories about the importance of emotions in rational choice making and the over-all relevance of this theorizing to the study of law. *Id.*

280. *Id.* at 248. "There is evidence that a desire to avoid the loss of face motivates countries in the context of international negotiations." *Id.* at 253. Though foreign to many Westerners, the concept of behaving honorably and saving face is prevalent and extremely powerful in Eastern cultures. *Id.*

281. SPETH, *supra* note 1, at 162-63 (discussing the "command and control" model as applied to economics).

282. Huang, *supra* note 261, at 249.

283. SPETH, *supra* note 1, at 75. "[A]ttempts so far at solving environmental ills have fallen short . . . the responses mounted by the international community appear pitifully weak." *Id.* "[T]he bottom line is that these treaties and their associated agreements and protocols do not drive the changes that are needed." *Id.* at 96.

284. Huang, *supra* note 261, at 253.

continue to rely exclusively on the external—and failing—colonial method of coercion and punishment.[285]

3. The Rhetoric of Rights: Discerning Living Rights from Ghosts

Author and poet Oscar Wilde, in his work *Critic as Artist*, bestows the highest power of art creation to the art critic: "For the highest criticism deals with art not as expressive, but as impressive, purely."[286] Rights are also impressive: one can express one's rights from the rooftops until one goes hoarse, like a tree falling alone in a forest, but unless those rights are recognized by others, they are essentially dead, and merely aspirations or dreams. They are ghost rights.

There is much discourse surrounding rights and legal implications of these rights.[287] One of the feminist criticisms of international law is its creation of rights without practical meaning.[288] A true revolution in consciousness should reflect a distinction between living rights and mere ghosts. Living rights are valuable, relevant, and powerful. They produce tangible changes and receive the utmost respect and deference.[289] To be

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285. *See* SPETH, *supra* note 1, at 191-202.

286. OSCAR WILDE, THE PORTABLE OSCAR WILDE 84 (Richard Aldington & Stanley Weintraub, eds., Penguin 1974). Art creation through critique is "the highest kind." *Id.* at 85.

> It treats the work of art simply as a starting-point for a new creation. It does not confine itself—let us at least suppose so for the moment—to discovering the real intention of the artist and accepting that as final. And in this it is right, for the meaning of any beautiful created thing is, at least, as much in the soul of him who looks at it as it was in his soul who wrought it. Nay it is rather the beholder who lends to the beautiful thing its myriad meanings, and makes it marvelous for us, and sets it in some new relation to the age, so that it becomes a vital portion of our lives, and a symbol of what we pray for, or perhaps of what, having prayed for, we fear that we may receive.

Id. at 85-86.

287. *See* Joyner & Little, *supra* note 268, at 146. "In a feminist analysis, however, rights are, to some extent, linguistic promises that accomplish little change in the area of gender equality. While the thrust of a right to a healthy environment certainly is correct, the right's genuine practical implications are not as clear." *Id.*

288. Charlesworth, *supra* note 275, at 634-43. "Feminist scholars have argued that, although the search for formal legal equality through the formulation of rights may have been politically appropriate in the early stages of the feminist movement, continuing to focus on the acquisition of rights may not be beneficial to women." *Id. See also* Joyner & Little, *supra* note 268, at 255-57. Many international instruments assert "in different ways a like-minded legal entitlement: all peoples have the right to enjoy a wholesome and robust environment that promotes quality of life and fundamental social and economic well-being." *Id.* at 255. However,

> [R]ights may assert profound hopes, but they do not, in and of themselves, bring about the realization of the content of those hopes or that right. Rights require legal implementation and active support by policy-makers. Unfortunately, the acknowledged human right to a healthy environment, which is extolled and purportedly ensured by numerous international agreements, suffers from the lack of implementation and enforcement by national governments.

Id.

289. The rights enumerated in the U.S. Constitution are an example of "living rights." U.S. CONST. Amen. I-X. The Bill of Rights is defended and enabled by a strong judiciary. U.S. CONST. ART. III. Other assertions must yield: laws that violate rights will be struck down. *Id.* The right to a fair trial, for example, means that the accused receive legal counsel (even if the people, essentially the opponent, have to pay for it with public defenders). *See generally* Gideon v. Wainwright, 372 U.S. 375 (1963) (stating that violations of these rights may nullify any proceedings); *see generally*

truly alive, the right to something must have that right *because* complimentary counterparts allow or enable it. Rights must reciprocally receive enunciated duties and responsible parties that ensure that rights are recognized, fully enabled and have actual meaning.

Unfortunately, even some rights recognized by the United Nations carry no real force or practical impact.[290] These phantoms are truly scary—by giving the false appearance of change, they can slow progressive movements. Also, ghost rights allow the powerful to fight against needed action with an arsenal of words that carry no impact.[291] Recognizing ghost rights ensures that concerned activists are not satiated with benign rhetoric.[292]

While attainment of rights certainly has profound emotional and psychological implications, real power comes from obligations, duties and responsibilities of other parties.[293] Courts of international law have refused to enforce ghost rights. The International Court of Justice enunciated this in the *Asylum* case: "[t]he Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the ex-

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Miranda v. Arizona, 384 U.S. 436 (1966) (holding that a violation of the Fifth Amendment nullified defendant's conviction).

290. The United Nations has announced the right of all people to be free from hunger and poverty. U.N. INT'L COVENANT ON ECONOMIC, SOCIAL & CULTURAL RIGHTS, Article 11, *available at* http://www.unhchr.ch/html/menu3/b/a_cscr.htm (Jan. 3, 1976). While the covenant calls upon signing members to enact legislation empowering this right, the treaty has not been fulfilled, as recent famines evidence. How this right will be realized, and who exactly will be responsible for empowering it, is to be decided domestically. Because many signing nations have refused to accept complete responsibility, the right of all people to be free from hunger is more of a dream or aspiration than a living right.

291. *See* GURUSWAMY, *supra* note 12, at 75 (citing HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 454–56 (R. Tucker ed., 2d ed. 1966)). "The term 'norm' designates the objective phenomenon whose subjective reflections are obligation and right. The statement that the treaty has 'binding force' means nothing but that the treaty is or creates a norm establishing obligations and rights of the contracting parties." *Id.* at 75. In terms of customary international law, enforceability relies on "a right belonging to one party and a duty lying on the other party. Without that nexus of legal obligation, and the *opinio juris* which recognizes it, there is no custom." *Id.* at 103. *See also* Elizabeth Olson, *Forum on Torture Hears of U.S. Efforts to End Police Brutality*, N.Y. TIMES, May 11, 2000, at A19 (despite the fact that the United States has signed and ratified treaties pronouncing the human right to be protected from torture, the United States conceded the truth of an Amnesty International report finding "institutionalized" torture throughout the United States).

292. Recognizing the pain in ironic and hollow words, Jane Jacobs explains: "There is a quality even meaner than outright ugliness or disorder, and this meaner quality is the dishonest mask of pretend order, achieved by ignoring or suppressing the real order that is struggling to exist and be served." JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 15 (1961).

293. For a discussion of the emotional implications of rights, *see* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 431 (1987). "'Rights' feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood that is very hard to contemplate reconstructuring . . . at this point in history." *Id.* Recognizing ghost rights should in no way belittle the hard work of activists who have won the acknowledgment of rights. However, their movements will be best served by truly empowering the rhetoric with action that really helps the powerless and rightless. *See also* SPETH, *supra* note 1, at 194 "[I]t is imperative that we, the peoples of Earth, declare our responsibility to one another, to the greater community of life, and to future generations." *Id.*

pression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State."[294]

Responsibilities give rights their power: meaning both that (1) duties instilled in a second party enable and empower the rights of the primary party and that (2) parties (developed nations) actually give rights (like the human right to eat) their (the nation's) power (aid). Future generations may have a valid right to visit living coral reefs, and arguably the reefs have a valid right to exist. Unfortunately, because no one organization has ever assumed responsibility for the healthcare of coral reefs, this right is probably unrealizable—a ghost.[295]

Rights also are restrictively impressive, not boundlessly expressive, because one right ends where the other begins. Rights often dissolve into phantoms when they are unprotected and can be intruded on by the perceived rights of another. Many regional debates are clothed in the rhetoric of rights. Fishermen, loggers and farmers (among others) assert their right to earn a living over environmental rights. Their right will mean nothing, however, if the resources on which they depend (fish, trees, and soil and water) are exhausted. Their right must be protected, perhaps by self-restraint, to continue to live and have meaning.

Some sovereign rights, such as the right to bear nuclear weapons, are self-empowering simply through the "might-makes-right" physics of power—the global community acknowledges its responsibility to concede through silence. Also, the bestowing of some rights may appear to be unilateral exercises of self-restraint. However, they are typically self-serving adherence to custom so the right-giver can enjoy the same custom. Because most nations want unrestricted development of their own natural resources, international law recognizes that States have a "sovereign right to exploit their own resources pursuant to their own environmental and developmental policies . . . ."[296]

Principle 2 also contains the protective provision that States have a "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States."[297] While state responsibility has occasionally been enforced,[298] it is only upon the con-

294. Asylum Case (Colombia v. Peru), 1950 I.C.J. 266, 276 (1950).

295. SPETH, *supra* note 1, at 57–58. Despite numerous treaties on the protection of the oceans, coral reefs have not been adequately protected and some observers believe that they are "doomed." *Id.* at 58. Because there is no responsible party and duty to protect it, the coral reefs have lost their right to exist. *Id. See also supra* notes 130-33 and accompanying text.

296. RIO DECLARATION, *supra* note 149, at princ. 2.

297. *Id.*

298. *See generally* Trail Smelter Arbitration (U.S. v. Can.) (1941) 3 U.N.R.I.A.A. (1938) (1949). Washington state farmers claimed damage caused by a Canadian smelter's air pollution. *Id.* Because both parties agreed to be bound by the arbitration, a tribunal held Canada liable and ordered payment of some (not all prayed for) damages to the United States. *Id.*

cession of the State to jurisdiction.[299] There were no suits—let alone damages awarded—for any of the injured parties after the world's largest environmental disaster.[300] There is simply no international environmental agency with the power to enliven many bestowed rights.[301] These rights remain dead on-the-books rhetoric.

So, while creating and acknowledging rights is an important step, empowering and enlivening rights is essential. As Speth's work illustrates, we cannot be lulled into complacency by the appearance of rights in big-sounding international treaties. Investigation shows that laws and practice often disregard espoused human, environmental or other rights.[302] Also, perceiving a right to something does not automatically entail open-ended empowerment. One "right to" may overstep another, so understanding the power dynamics between rights and duties helps effectuate self-restraint and delineate living rights.

Also, Speth's work is practical because he articulates obligations and calls for the imposition of duties. Throughout the global community, pages are overrun with talk about "the right to," but Speth offers real options for change when he says "the right because." He actually tells the reader how to empower their right.[303]

Sometimes, the duty is to refrain from asserting one's perceived rights. To realize humanity's universal right to a healthy environment, Speth calls for a true measure of self-control:

> [O]ur duty to exercise a conserving and protecting restraint extends . . . to the community of life—animal and plant—that evolved here with us. There are limits beyond which we should not go in disrupting or changing this community of life, which, after all, we did not create. Although our dominion over the earth may be nearly absolute, our right to exercise it is not.[304]

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299. Military & Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 110-12 [hereinafter Military & Paramilitary Activities]. Although the United States was found liable for harm caused to Nicaragua by the United States' support for Contra rebels, the United States has never paid the damages ordered by the court. *Id.*

300. The nuclear accident at Chernobyl, in the former Soviet Union, is clearly transboundary harm. "Scientists estimate that up to 600,000 people outside of the Soviet Union have been adversely affected by the nuclear fallout." GURUSWAMY, *supra* note 12, at 552. But no one has ever held the Soviet government accountable for the damage. *Id.* at 550-52.

301. RIO DECLARATION, *supra* note 149, at princ. 1. "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." *Id.*

302. SPETH, *supra* note 1, at 176.

303. *Id.* at 152-228. Speth's eight transitions are all ways to enliven the espoused universal right to a healthy environment. *Id.* at 152. Also, following the tenth chapter, Speth lists activist organizations and their contact information, transition by transition. *Id.* at 203-28. Going beyond a rhetoric of rights, Speth actually enables the reader with tools and information to empower their activism.

304. *Id.* at 5 (quoting U.S. COUNCIL ON ENVIRONMENTAL QUALITY, GLOBAL ENERGY FUTURES AND THE CARBON DIOXIDE PROBLEM iii-viii (Government Printing Office, 1981)).

4. Feminism/ist Movement/s and the Environmental Cause

As Speth begins his chapter on transitions in culture, he says, "[t]he change that is needed can be best put as follows: in the twentieth century we were from Mars but in the twenty-first century we must be from Venus—caring, nurturing, and sustaining."[305] Women and feminism (in all its forms) play an essential role in a new cultural consciousness. Principle 20 of the Rio Declaration sets forth, "[w]omen have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development."[306]

Women already exercise their power, or show the unwelcome consequences of squelching it, through population rates.[307] In many ways, the women's movement, like the environmental movement, functions as part of a living interdependent system incorporating economics, politics, sociology and more. Moreover, the women's movement, like the environmental movement, can both inspire and benefit from the casting off of the exploitative, oppressive and destructive legacies of colonialism, reflected in politics, economies, societies, and more.

Feminizing our worldview should not replace one inequitable power structure with another. It is not simply acquiring the right for women to exploit like men.[308] Rather, feminizing paradigms can synthesize the best of traditional actions with the best of new approaches. Following from the abandonment of dualism[309] and colonial anthro-contempo-

305. SPETH, *supra* note 1, at 191. Speth may be criticized for borrowing from feminism without giving proper credit. Though uncited, this admonition appears to reference the book MEN ARE FROM MARS, WOMEN ARE FROM VENUS by John Gray, PhD., especially because the three adjectives for a Venus paradigm—caring, nurturing, and sustaining are characteristics typically associated with femininity. This may be a glaring oversight. However, it may also be out of respect for certain schools within feminism that resist the biological determination inherent in blanket gender generalizations. It can be fairly argued that feminism, by undoing duality and incorporating ironic contradictions to liberate women (and men) from restrictive dualist stereotypes, has undone itself and would prefer to be called humanism.

306. RIO DECLARATION, *supra* note 149, at princ. 20.

307. *See supra* notes 159-61 and accompanying text for a discussion of women and population growth.

308. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND THE LAW 4-5 (Harvard Univ. Press 1987). As MacKinnon explains:

> With few exceptions, feminism applied to law has provided no critique of the state of its own, and little insight into specific legal concepts from the standpoint of women's experience of second-class citizenship. Particularly in its upper reaches, much of what has passed for feminism in law has been the attempt to get for men what little has been reserved for women or to get for some women some of the plunder that some men have previously divided (unequally) among themselves. This is not to argue that women should be excluded from the spoils of dominance on the basis of sex, exactly. Rather it is to say that it is antithetical to what women have learned and gained, by sacrifice chosen and unchosen, through sheer hanging on by bloody fingernails, to have the equality we fought for turned into equal access to the means of exploitation, equal access to force with impunity, equal access to sex with the less powerful, equal access to the privilege of irrelevance. As male academics have been able to afford to talk in ways that mean nothing, so also women . . . if this is feminism it deserves to die.

Id.

309. *See supra* notes 260-69 and accompanying text.

Eurocentrism[310] is a transition in consciousness that embraces traditionally feminine ideas of inclusion,[311] community, and cooperation.[312] This is the transition that Speth advocates—a new culture of caring.[313]

Carol Gilligan's work *In a Different Voice*[314] uses innovative child development concepts to help formulate a feminine perspective: the "ethic of care."[315] Her studies revealed that girls invoke different problem-solving ethics than boys. Girls tend to invoke an

> 'ethic of care' attitude . . . . [G]irls place a high level of importance on 'relationships, responsibility, caring, context, [and] communication.' Boys, on the other hand, employ an 'ethic of rights' or 'ethic of justice' mind-set, which tends to emphasize principles of right and wrong, fairness, logic, rationality, and winners and losers, while ignoring context and relationships.[316]

As we teach our sons and daughters to play nicely together, can we learn from them? Can we reconcile and recreate a world where it is logical to be caring, rational to consider context and fair to consider relationships?[317]

Although some feminist theorists would argue against Gilligan's generalized distinctions based on gender,[318] citing them as a product of a problematic social structure,[319] it is naïve and impractical to ignore the uniqueness of female experience.[320] On one hand is a distinctive charac-

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310. *See supra* notes 270-85 and accompanying text.

311. *See supra* notes 207-13 and accompanying text for a discussion of inclusion.

312. SPETH, *supra* note 1, at 201. "Down one path, [expected economic] . . . growth can protect, regenerate, and restore the environment. It can provide sustainable livelihoods for the world's poor and lead to large improvements in quality of life for all." *Id.*

313. SPETH, *supra* note 1, at 191. This new paradigm can also be discussed in terms of Social Ecology. *See* Clark, *supra* note 263, at 5-11. "Social Ecology proposes a principle of *ecological wholeness*, which Bookchin defines as 'a dynamic unity of diversity' in which 'balance and harmony are achieved by ever-changing differentiation.'" *Id.* (quoting MURRAY BOOKCHIN, THE ECOLOGY OF FREEDOM: THE EMERGENCE AND DISSOLUTION OF HIERARCHY 24 (1981)).

314. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 164 (1982).

315. *Id.*

316. Joyner & Little, *supra* note 268, at 237.

317. GILLIGAN, *supra* note 314, at 164.

318. *See* Owen Flanagan & Kathryn Jackson, *Justice, Care and Gender: The Kohlberg-Gilligan Debate Revisited, in* FEMINISM & POLITICAL THEORY 37, 39 (Cass R. Sunstein, ed., 1990).

319. *See* Joyner & Little, *supra* note 268, at 266 n.78. "Males and females are both capable of accommodating either the 'ethic of care' or 'ethic of justice.'" *Id.* at 254. Joyner & Little explain that Flanagan & Jackson "argue that the care-justice differentiation does not mandate that people employ either of these orientations all of the time." *Id.* The acceptance of an inclusive paradigm would indicate that it is possible to synthesize both. *See* Charlesworth, *supra* note 275, at 616. Joyner & Little describe the attack on Gilligan's theory as "[c]oncerns . . . that identification of a 'distinctive feminine morality' could impede the prospects for feminist international law attaining more 'universal validity.'" Joyner & Little, *supra* note 268, at 238. *See also* Flanagan & Jackson, *supra* note 318, at 39.

320. Joyner & Little, *supra* note 268, at 238.

> Why deny the reality of difference? To recognize that men and women reason in different ways and come to moral decisions through different processes does not perforce perpetuate male power. Nor does it admit to any female inferiorities or male superiorities.

ter—woman. [321] On the other hand, we have feminists who reject this "women's voice" concept ideologically as a reinforcing product of biological determinism.[322] And on the other hand we have feminists who primarily and fundamentally reject any science or discourse as gender-biased and flawed.[323] And on yet another hand, we have radical feminist theorists who favor inclusion to the point of paradox, who agree and disagree with everyone.[324]

The fact that we have four hands also illustrates the limits of dualistic thinking and traditional metaphors.[325] It reveals the need for us to

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Rather, it provides more solid ground on which women can assert their own moral considerations.

Id.

321. Charlesworth, *supra* note 275, at 615 ("Much feminist scholarship has been concerned with the identification of a distinctive women's voice that has been overwhelmed and underestimated in traditional epistemologies."). But attendant to that fundamental concept are worlds of ideas of what it means to be feminine or female or human.

322. *See* MACKINNON, *supra* note 308, at 4-5.

323. Charlesworth, *supra* note 275, at 645 n.6 ("Some continental European, particularly French, feminists have pursued a different set of concerns from those of Anglo-American feminists. They have undertaken the task of deconstructing the dominant masculine modes of speech and writing."). *See also* LUCE IRIGARAY, SPECULUM OF THE OTHER WOMAN 137 (Gillian C. Gill trans., 1985), noting:

> But man only asks (himself) questions that he can already answer, using the supply of instruments he has available to assimilate even the disasters in his history. This time at any rate he is prepared to lay odds again, and, give or take a few new weapons, he will make the unconscious into a property of his language. A disconcerting property, admittedly, which confuses everything he had long since assigned meaning to. But that, it seems, is not the most important thing at stake. The really urgent task is to ensure the colonization of the new 'field,' to force it, not without splintering, into the production of the same discourse. And since there can be no question of using the same plan/e [sic] for this 'strange' speech, this 'barbarous' language with which it is impossible to conduct a dialogue—read monologue—the discovery will be set out hierarchically, in stages. Will be brought to order. By giving here a little more play to the system, here a little less. The forms of arrangement may vary, but they will all bear the paradox of forcing into the same representation—the representation of the self/same—that which insists upon its *heterogeneity*, its *otherness*.

Id.

324. CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 241-44 (1989).

> Inequality on the basis of sex, women share. It is women's collective condition. The first task of a movement for social change is to face one's situation and name it. The failure to face and criticize the reality of women's condition, a failure of idealism and denial, is a failure of feminism in its liberal forms. The failure to move beyond criticism, a failure of determinism and radical paralysis, is a failure of feminism in its left forms . . . . As sexual inequality is gendered as man and women, gender inequality is sexualized as dominance and subordination . . . . The next step is to recognize that male forms of power over women are affirmatively embodied as individual rights in law.

Id. MacKinnon includes characterizing a distinctive "women's voice," as a primary step, with casting off of oppressive determinist labels. Her accommodation of divergent views reflects an inclusive paradigm. *See* SPETH, *supra* note 1, at 201. Speth applies this reconciliatory approach in his sustainability doctrine, his concepts of transition (implying a movement and not a constructed polarity switch, like legal-illegal), and his generally inclusive approach. *Id. See also supra* notes 207-13 and accompanying text.

325. Joyner & Little, *supra* note 268, at 239.

> Often the male legal dimension is portrayed in asymmetrical and conflictive terms, for example, as right versus wrong, or legal versus moral, or good versus evil . . . or man versus nature. Feminists allege that the male reasoning process tends to filter options through

respect difference and to abandon labels and oversimplification,[326] reflecting the importance of Speth's eighth transition to a new paradigm that is inclusive and reconciliatory rather than divisive and adversarial.[327]

Feminists and postmodernists and other –ists and –isms are rethinking thought and the thinking process. They are questioning words, discourse and the questions themselves. As long as these intellectual acrobatics serve as more than ends in themselves, they can be an essential part of restoring global health and solving environmental problems by helping us into Speth's transition of consciousness.[328]

A new consciousness that conforms to Speth's vision should replace dualism with inclusiveness, shed an exploitative "command and control" power regime for a paradigm of honor and self-restraint, insist that mere ghost rights be given enlivening power, and feminize a worldview to include human—not purely male or female—characteristics, while at the same time accepting the uniqueness of individual human experience.

V. LEGAL IMPLICATIONS

> *The basic framework of policy formation tends to remain in place as long as the institutions of power and domination are stable, with the capacity to deflect challenges and accommodate or displace competing forces.*[329]

The momentum of Speth's transitions is the type of force that can knock the powers-that-be off balance and open the power structure up to change. Incorporating Speth's eight transitions, Part V will take ideas presented in Part IV, with the overall theme of inclusiveness[330] and explore the practical applications of new paradigms to the world of law. Government and law are also organisms within the global ecosystem.

> a sieve of these competing 'black and white' dualities, which may be implicitly related to gender hierarchies, political power, and social domination.

Id. However, contemporary philosophy has a response to dualistic thinking. "Dialectic synthesis does not permit clear labeling of the dichotomies as mutually exclusive or self-evidently incompatible." *Id.* at 240. "Proponents of feminist international law encourage the search for a deeper understanding of the commonalities across seemingly conflictive legal dichotomies." *Id.*

326. *Id.* at 266 n.28.

> Nearly all feminists are too eclectic to fit neatly into any one category, and so it is misleading to set up categories or theories as though they worked in that limiting sort of way for feminists. Creating distinct or rigid categories within which to fit particular account or limit dialogue is a decidedly anti-feminist way of proceeding, as feminists generally oppose this sort of abstract conceptualization without attention to context and detail.

Id. (quoting FEMINIST JURISPRUDENCE AND THE NATURE OF LAW, INTRODUCTION TO FEMINIST JURISPRUDENCE 3, 9 (Patricia Smith ed., 1993)).

327. SPETH, *supra* note 1, at 201.

328. *Id.* at 191.

329. CHOMSKY, *supra* note 270, at 50.

330. *See supra* notes 207-13 and accompanying text for a discussion of inclusion.

Law dictates, defines and depends on politics, society, economics and other human systems—and vice versa.[331]

Section A considers how emerging progressive concepts of liability—both public and private—could develop to help solve the global health crisis. Section B considers how a paradigm of inclusiveness would apply to Speth's seventh transition—taking good governance seriously.[332] This includes a new model for a much-needed international environmental governing body with real power.

A. The Implications of Expanded Liability

If big businesses cannot be motivated by moral obligations, perhaps legal duties will cause them to turn to ecologically beneficial practices. Customs are strongly influential in international law,[333] so as JAZZ[334] inspires private businesses to exercise sound environmental practices, the standard by which all behavior is measured (through norms and custom) will rise.[335] As the consequences of environmental degradation are understood and as international governing bodies wield greater influence, concepts of liability are changing. This change could benefit global environmental health.

Businesses may be inspired to "go green" by the fear of liability in tort, as well as fines, sanctions and even criminal prosecution.[336] One trend that is emerging is a FUSION[337] of international tort law and business strategies.[338] Speth explains that "the environment is becoming more central to business strategic planning."[339]

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331. SPETH, *supra* note 1, at 106. "[T]he potential success of international environmental law . . . has been undermined by the unfortunate tendency to neglect the social and political context in which international agreements are arrived at and then implemented." *Id. See also* Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 ("[I]nternational law . . . needs to be multidisciplinary, drawing from other disciplines such as history, sociology, anthropology, and psychology such wisdom as may be relevant for its purpose.").

332. SPETH, *supra* note 1, at 172-90. "International environmental law is failing today on the big issues, but it need not." *Id.* at 173.

333. *See* GURUSWAMY, *supra* note 12, at 102-03, for a discussion of customs becoming enforceable as law. *Id.* Certain customs may become "obligatory as a matter of law." *Id.* These state practices will even become enforceable against parties outside the general practice, as a matter of binding international law. *Id.*

334. *See supra* notes 235–39 and accompanying text for a discussion of JAZZ.

335. SPETH, *supra* note 1, at 186. Embodying the spirit of JAZZ, several large companies have voluntarily agreed to adopt more eco-friendly practices. *Id.*

336. SLOMANSON, *supra* note 53, at 603-04. Fifty European states have drafted a treaty on criminal liability for environmental wrongs. *Id.* Among other things, the treaty prosecutes knowing pollution and negligence that results in harm to persons or "substantial damage to the quality of air, soil, water, animals or plants." *Id.* The Preamble pronounces the gravity of environmental wrongs: "[E]nvironmental violations having serious consequences must be established as criminal offences subject to appropriate sanctions . . . perpetrators of such acts . . . [shall] not escape prosecution and punishment." *Id.*

337. *See supra* notes 240-42 and accompanying text for a discussion of FUSION.

338. SPETH, *supra* note 1, at 187.

339. *Id.* Companies are voluntarily cleaning their emissions, issuing "sustainability reports" to stockholders, developing profitable sustainable products and enterprises, building new partnerships

Also, massive tort liability is taking on international dimensions. ChevronTexaco is currently involved in a $6 billion suit for damages after its oil drilling operations caused human and ecosystem illness in Ecuador.[340] If companies are made to pay for environmental harm, they will be encouraged both to avoid future liability through eco-friendly practices, and to incorporate environmental costs in their pricing.[341]

Another consideration is whether future generations could have standing in suits to protect their inheritance. Could future generations, as legal entities with inheritable property rights, be recognized in suits to preserve finite resources? What about the potential for a child to sue a parent over depletion of non-renewable resources on inheritable properties, on behalf of future grandchildren (who have legally been given title upon death of parent and child)? Could this standing extend to heirs of public lands? If an ethical obligation to future generations is not inspiring,[342] could a legal obligation to sustain the planet for the unborn be recognized?

There are huge ramifications if the United States and other polluting nations were to be held legally responsible for the consequences of global warming.[343] The United States is the world's largest emitter of greenhouse gases by far, but smaller nations will feel the most drastic global warming impacts.[344] If some of the predictions of sea level rise are correct, entire island nations will be submerged during the twenty-first century.[345] Some estimates predict catastrophe by 2030.[346]

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with environmental groups and more. *Id.* The changes reflect the pure fact that sustainability is good for business *Id.* Also, these progressions may reflect a change away from the *growth-at-all-costs* imperative that drives environmental degradation. *Id.* at 137. Speth explains how "[s]o much in our society, economy, and polity is geared to rapid, continued economic growth. *Id.*

340. Carla Bass, *In Ecuador, First Phase of Trial Ends in Battle with ChevronTexaco*, PLATT'S OILGRAM NEWS, Nov. 6, 2003, at 1. Although the case was dismissed to be tried in Ecuador, a New York court has assured plaintiffs that an Ecuadorian judgment will be enforced in the United States. Aguinda v. Texaco, 142 F. Supp. 2d 534 (S.D.N.Y. 2001).

341. SPETH, *supra* note 1, at 186-87. Environmental issues affect corporate America when, for example, "inaction on climate change" is assessed as a financial "risk." *Id. See also supra* notes 171-74 and accompanying text for a discussion of environmentally honest pricing. "[W]henever a scarce resource comes free of charge (as is typically the case with our limited stocks of clean air and water), it is virtually certain to be used to excess." *Id.* at 133. However, "[e]nvironmental economists make a powerful case for full-cost pricing and have identified a variety of economic instruments that are available to move in this direction." *Id.* at 162.

342. *Id.* at 192 (discussing "trusteeship of the earth's natural wealth and beauty for generations to come").

343. *See id.* at 69. "Another source of pressure for climate action is likely to come from the courts. Citizens, states, and other parties injured by climate disruption could seek redress in court." *Id.*

344. SPETH, *supra* note 1, at 192. The United States "emits the same amount of greenhouse gases as 2.6 billion people living in 151 developing nations. Yet the developing world is more vulnerable to change." *Id.* at 61. *See also* Nancy Shute & Charles W. Petit, *Preparing for a Warmer World*, U.S.NEWS & WORLD REPORT, July 6, 2004, at 14. "The United States is the single largest generator of greenhouse gases, contributing one quarter of the global total." *Id.*

345. Shute and Petit, *supra* note 344, at 11. "Rising sea levels could contaminate the aquifers that supply drinking water for Caribbean islands, while entire Pacific island nations could disappear under the sea." *Id.* As Tuiloma Neroni Slade, Samoa's U.N. representative and chairman of the

The damage award to an island nation—whose own greenhouse emissions are almost nonexistent—that has been completely annihilated by rising seas is unfathomable. And losses are far beyond financial—encompassing cultures, natural and anthropological wonders, and even human life. Although the United States has already ignored court decisions and refused to pay previous damage awards,[347] laws are constantly changing. Perhaps even the possibility of paying for a destroyed country will encourage practices of sustainability, in order to avoid liability for harm. Advancing concepts of liability for environmental damages impacts corporations, nations, local governments and private actors. Though love of money has encouraged environmentally destructive patterns, fear of losing that money through liability may be the seminal force needed for real change.

B. Global Governance that Embraces a New Consciousness

As today's serious global health crisis indicates, current international environmental law is failing.[348] Soft law is weak and the current plentitude of treaties has not solved the problems.[349] Citing the inefficiency, repetition and disorganization that results from a multitude of separate agreements, Dr. Ramlogan has concluded that "treaty congestion and its difficulties may be avoided by the abandonment of the sectoral approach and the employment of an all-embracing approach."[350] He joins Speth and others who call for the creation of a powerful unified international environmental organization.[351]

Alliance of Small Island States, explains: "Climate change is the type of global issue not of our making, so it raises questions of equality and ethics." Barbara Crossette, *Rising Seas Plague Island States*, DENV. POST, Sept. 5, 1999, at A-3. *See also* Associated Press, *Tuvalu: Country Ready to Pack Up*, N.Y. TIMES, July 20, 2001, at F1. The eleven thousand residents of Tuvalu, a tiny South Pacific island nation (with its highest elevation only sixteen feet above sea level), have sought refuge in other countries, as they predict rising seas will make their country uninhabitable in fifty years. *Id.*

346. SPETH, *supra* note 1, at 62. "In a business-as-usual scenario, earth is scheduled to reach this [dangerous carbon dioxide] level by about 2030." *Id. See also* Michael D. Lemonick, *Life in the Greenhouse*, TIME, April, 2001, at 26."With seas rising as much as 3 feet, enormous areas of densely populated land—coastal Florida, much of Louisiana, the Nile Delta, the Maldives, Bangladesh—would become uninhabitable." *Id.*

347. *See* Military & Paramilitary Activities, *supra* note 299, at 110-12.

348. SPETH, *supra* note 1, at 105. "[T]he international institutions created in the United Nations to address global environmental issues . . . are among the weakest multilateral organizations." *Id. See also* Palmer, *supra* note 32, at 262. The United Nations does have an Environmental Program (UNEP) but as Sir Palmer explains: "it is not an adequate international organization for protecting the world's environment." *Id.* at 261.

349. GURUSWAMY, *supra* note 12, at viii. "[A]s long as we do not have an effective and enforceable legal regime at the international level, we must rely on political commitment as the primary basis for cooperative action in negotiating and enforcing legal instruments." *Id.* Also, Speth notes: "International agreements are essential in confronting global environmental challenges, but rarely will they solve major problems by themselves, and even less rarely will they succeed if their requirements are not clear and meaningful." SPETH, *supra* note 1, at 100-01.

350. Ramlogan, *supra* note 140, at 116.

351. *Id.* SPETH, *supra* note 1, at 177. "Over the past decade, the leaders of France, Germany, and other countries have called for the creation of a World Environmental Organization [WEO]." *Id.* "Today's GEOpolity approach can also be redesigned for success by insisting on new procedures for

Although unconventional changes in international government may seem drastic, drastic measures are needed.[352] While globalization and loss of national sovereignty are legitimate concerns, the practical reality is that the World Trade Organization (WTO) exists and wields enormous power.[353] To allow global economic activity to grow exponentially without creating a World Environmental Organization (WEO) with power—and budget—equal to the WTO is not only reckless global healthcare, it is bad business.[354] Those opposed to environmental preservation are adamantly afraid of a WEO, indicating the potential scope and impact of its power.[355]

A WEO should embrace concepts from the new consciousness.[356] One of the dangers of binary logic is creating adversarial pairs from differences that are not necessarily in opposition.[357] Escaping the limits of dualistic thinking could facilitate new law-making techniques. Microtreaties on detailed particulars could be part of larger treaties.[358] Hopefully, many urgent goals could be realized through a specialized

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setting international requirements and on new institutions, including a World Environmental Organization." *Id.* at 176. *See also* Palmer, *supra* note 32, at 278-83 (discussing New Zealand's proposal to the United Nations which suggests implementation of an Environmental Protection Council).

352. As long as corporations are aided by the WTO, declining natural assets and biotic impoverishment may go unchecked: "[m]ost analysts now agree that, from an environmental perspective, sustainable development requires living off nature's income rather than consuming natural capital. In the terminology of the economists, it implies nondeclining natural assets, at a minimum." SPETH, *supra* note 1, at 141. Unfortunately, while "the transition to a globalized world is progressing rapidly, . . . the transition to a sustainable one is not." *Id.*

353. *Id.* at 99. "Thus far, governments have been willing to concede much in the area of sovereign autonomy to achieve economic expansion but not to protect the environment." *Id.* Speth also notes: "While efforts to promote economic globalization proceed apace through the WTO and elsewhere, policy-makers should pursue, with equal determination, reforms and institutions needed in the social and environmental areas." *Id.*

354. *See id.* at 147. "If the world wishes to evolve toward an international economy, and it certainly seems to, it will need to develop an international polity equal to the challenge of governing its newly global economy." *Id.* Speth posits, "[e]ventually, leaders in the political and business worlds will see that it is powerfully in their self-interest to promote the eight transitions." *Id.* at 198. Sustainable development should be the goal of any world trade. However, because financial gain and environmental protection do not fit easily together, we need a WEO. A WEO comparable to the WTO could facilitate global sustainability and protect the environment from degradation.

355. *See id.* at 141-47. A group of conservative think tanks wrote to President Bush to applaud his decision not to personally attend the Johannesburg convention on Sustainable Development in 2002. They also "strongly support . . . [President Bush's] opposition to signing new international environmental treaties or creating new international environmental organizations . . . ." *Id.* at 112. The anti-environmentalists continue: "In our view, the worst possible outcome at Johannesburg would be taking any steps towards creating a World Environmental Organization, as the European Union has suggested . . . ." *Id.* Reflecting their prejudice—and the inference that their opposition to a WEO is actually a strong endorsement—they continue: "The least important global environmental issue is potential global warming, and we hope that your negotiators at Johannesburg can keep it off the table . . . ." *Id.* These and other efforts to forestall the creation of a WEO indicate the potential for such an organization to affect real change.

356. *See supra* Part IV.C for an explanation of this new consciousness.

357. *See supra* notes 260–69 and accompanying text for a discussion of dualism.

358. Whether broken down by issue, or by increments, or both; rethinking proposals on an individualized basis may facilitate real progress. These tiny issue-by-issue agreements, in shades of participation rather than all or nothing, may make consensus and action readily realizable. Nations wouldn't be forced to make a binary participation decisions—to either join or not join. Rather, they could decide at what level, from a continuum of contribution intensities, to participate.

and fragmented system, replacing the "baby with the bathwater" practice that blocks so many valuable initiatives in today's scheme.[359]

Also, an ethic of care[360] is best administered on a particularized and individualized level, so that context and relationships are considered in the law-making process. Though environmental problems are large, trying to broaden and generalize issues denies the uniqueness and diversity of real world situations. A large representative organization can confront the behemoth of environmental degradation, but on a small, practical, issue-by-issue basis that will really fix problems. The governing body would be unified, but the issues addressed would be particularized. Instead of simply spawning grandiose treaties that do not function in real life,[361] a new world environmental legislature could effectively and judiciously develop contextualized, personalized and workable solutions.

As Sir Palmer explains: "What is missing from the present institutional arrangements is the equivalent of a legislature: some structured and coherent mechanism for making the rules of international law."[362] A world environmental legislature would be efficient, despite a full docket of small issues, because so much time and money that is currently wasted organizing and negotiating the negotiations—only a few meetings every decade thus far—would be saved.[363] Also, definitive consensual decisions about particular issues would prevent the problematic litigation we have currently under our vague practice of international customs and norms.

A paradigm of inclusion[364] would create a large, but more realistically representative, world congress. It could allocate votes to member nations based on population, economic contribution or equally (each nation has the same number of votes). Or perhaps all three, creating a triad of legislative bodies, akin to the two houses of the United States Congress.

Over-simplification and generalizing negates many experiences. An inclusive WEO, where a diversity of voices is heard, may affect greater change. States and interests within states are much more likely to con-

359. SPETH, *supra* note 1, at 104. Many nations, including the U.S., require that international agreements be ratified by domestic legislation. *Id.* In the United States, "[t]he Senate is a virtual graveyard full of unapproved environmental treaties." *Id.* Escaping binary form and providing a wide range of possibilities would make agreement more realizable.

360. *See supra* notes 314–24 and accompanying text for a discussion of the ethic of care.

361. *See* Palmer, *supra* note 32, at 263. "While the number of instruments is impressive . . . during the time these instruments were being developed, the environmental situation in the world became worse and is deteriorating further. There is no effective legal framework to help halt the degradation . . . . [M]any international agreements do not necessarily mean many ratifications." *Id.*

362. *Id.* at 264.

363. *Id.* at 263. There is much time and effort put into the large conventions that currently constitute world environmental law-making. As Sir Palmer points out: "[t]he making and negotiation of the instruments themselves has to start anew each time . . . . Each negotiation proceeds differently." *Id.*

364. *See supra* notes 207–13 and accompanying text for a discussion of inclusion.

form to legislation that they participated in creating than submit to regulation that is cast over them like a net.[365]

In addition to giving a large number of votes to various nations, the votes could be decided by various experts. Nations could design their electorate bodies using the jury model. As Sir Palmer explains: "[f]or such an institution to succeed, it must have access to high-quality streams of advice."[366] Experts from various scientific, economic, social and political arenas could come together like a jury to deliberate international environmental policies.[367] If jury-like panels are appointed by elected officials, democracy on a more public level remains intact.[368]

The WEO should also adopt a progressive epistemology. Conservation measures could be given a presumption of validity, modeled after the presumption of innocence.[369] Using a high burden of proof, experts must be convinced that ecologically protective measures are unfeasible, beyond a shadow of a doubt. This is similar, in science, to the precautionary principle advocated by Speth.[370]

The legislature will also have to run on some sort of majority rule principle.[371] A WEO should learn from the mistakes of the past and incorporate the best of innovations for its future.

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365. *See supra* notes 270-85 and accompanying text for a discussion of alternatives to Western "command and control" enforcement attempts.

366. Palmer, *supra* note 32, at 264. Many powerful leadership positions are filled by experts in their field. The United States Secretary of Defense is a military, not political professional. Similarly, representatives need not all be experts in the field of government. An inclusive legislature with inclusive electorate panels would provide access to unlimited expertise in all important organisms of the human "ecosystem." *See supra* notes 137-45 and accompanying text for a discussion of humanity's ecosystem(s).

367. In an era when many powerful politicians are elected for accomplishments in celebrity (and not Nobel-winning sciences, legal training or public service), allowing scientific experts and highly educated professional access to power may be essential.

368. Today judges, committee members and agency authorities have huge amounts of power, which they acquire through appointment. Panel members could be elected by the public, but this risks all the evils (private interest, campaign monies, party affiliation, etc.) of typical electoral politics.

369. At a convention for the Center for Health, Environment and Justice, Peter Montague remarked, "[w]e need to put the burden of proof on potential polluters to prove that a substance or activity will do no harm, instead of communities having to prove otherwise." Peter Montague, *Taking a Giant Step*, EVERYONE'S BACKYARD, Winter 1997, at 8.

370. SPETH, *supra* note 1, at 175-76 ("Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.").

371. Palmer, *supra* note 32, at 264.

> One of the biggest obstacles that must be overcome in international negotiations is the rule of unanimous consent. This rule impels each negotiating body to search for the lowest common denominator; it adds to the difficulty of negotiations because sometimes a single nation can resist the development of a common position and demand concessions as the price of securing unanimous consent.

Id. See also Ramlogan, *supra* note 140, at 82. "Developments like majority vote, provisional implementation, and the use of central supervisory bodies, alter somewhat traditional international law jurisprudence which promote the view that states are only bound by the international norms to which they have consented." *Id.*

CONCLUSION

As Einstein warned, "[t]he destiny of civilized humanity depends more than ever on the moral forces it is capable of generating."[372] Speth quotes Charles Reich, who wrote of a "new consciousness [which] seeks restoration of the non-material elements of man's existence, the elements like the natural environment and the spiritual that were passed by in the rush of material development."[373]

Part of the emerging contemporary paradigm is the concept of humanity's systems (politics, economics, etc.) as living entities, constantly growing and evolving. The term "environmental movement," as opposed to "environmentalism," a static noun, reflects this concept of motion and progress. Many of today's progressive movements reflect the new consciousness of inclusion, respecting diversity and revering life.[374]

Speth's transitions also embody this paradigm. They are not steps to be completed. Rather, they envision ethical kinetics—actively moving transitions toward a sustainable future.[375] As humanity advances through the twenty-first century, we must move toward harmonious habitation with and through the world's living systems.[376] The future of life as we know it may well depend on these transitions.

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372. EINSTEIN, supra note 17, at 94. *See also* FALK, *supra* note 31, at 91-92. Many writers during the Atomic Age and under the threat of nuclear holocaust were addressing global destruction through war. However, their thoughts about human behavior with annihilating consequences mirror concerns about global environmental destruction. And their aspirations for human restraint and action to prevent world-wide catastrophe are apt and fitting hopes for the current global crisis of environmental health.

373. SPETH, *supra* note 1, at 193. Speth continues with the hope that scholars "have given our species enough time to grow up. It is doubtful that the planet can take much more of our heedless childhood." *Id.*

374. For an example of such a progressive movement, *see* Clark, *supra* note 263, at 5-11. Social Ecology rests on the principle that "[t]he common planetary good can therefore be conceptualized only in a non-reductionist, *holistic* manner." *Id.*

375. SPETH, *supra* note 1, at 151. If we can move through the transitions, "our legacy from these early decades of the new century will be a world sustained, not a world of wounds." *Id.*

376. Speth espouses environmental preservation: "It is a sacred trust—our duty to our children, our neighbor's children, and their children—and it is a trust at which we are failing." *Id.* at 139.

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